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Supreme Court, U.S.
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In The

Supreme Court of the United States

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ROSARIO AVIADO,

Petitioner,

v.

INDUSTRIAL CLAIM APPEALS OFFICE, *et al.*,

Respondents.

◆

On Petition For A Writ For Certiorari
To The Colorado Court Of Appeals

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

1.

When Colorado's judicial branch politically opposes a bill that would place the state's workers' compensation judges in the judicial branch, in addition to other actions aimed at keeping workers' compensation judges out of the judicial branch, and then a case is heard in Colorado's judicial branch wherein a party alleges that the federal and state constitutions require that the state's workers' compensation judges be in the judicial branch, is a fair and impartial forum provided in Colorado's judicial branch as required by the due process clause of the Fourteenth Amendment to the United States Constitution?

2.

Has Colorado, which follows federal law regarding separation of powers, violated this Court's ruling in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) by ruling that litigation regarding workplace injuries can take place in the executive branch when *Northern Pipeline* requires suits that existed at common law, such as suits regarding workplace injuries, be heard in the judicial branch?

QUESTIONS PRESENTED – Continued

3.

Is there a rational basis, for the purposes of an equal protection analysis, for depriving workers' compensation litigants of judicial branch judges when all other injured parties and litigants in Colorado have their cases heard in the judicial branch?

PARTIES TO THE PROCEEDINGS

A list of all parties to the proceedings in the court whose judgment is subject of the petition is as follows:

Claimant-Appellant and Petitioner: Rosario Aviado

Respondents-Appellees and Respondents: Industrial Claim Appeals Office, Ensicon Corporation and Wasau Insurance Corporation

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PETITION FOR A WRIT OF CERTIORARI

Rosario Aviado respectfully petitions for a writ of certiorari to review the published opinion of the Colorado Court of Appeals which was denied certiorari by the Colorado Supreme Court.

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OPINIONS BELOW

The panel opinion of the Colorado Court of Appeals is officially reported at 228 P.3d 177 (Colo. App. 2009) and is reproduced at App. 1-15.

The order of the Industrial Claim Appeals Office in W.C. 4-648-693 affirming the order of the Office of Administrative Courts is reproduced at App. 16-32.

The order of the Office of Administrative Courts in W.C. 4-648-693 is reproduced at App. 33-66.

The en banc opinion of the Colorado Supreme Court denying certiorari is reproduced at App. 73.

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JURISDICTION

The judgment of the Colorado Court of Appeals sought to be reviewed was entered on April 16, 2009. A petition for rehearing was denied on May 14, 2009. The order denying certiorari by the Colorado Supreme Court was entered on April 5, 2010. This petition is timely under 28 U.S.C. § 2101(c), 28 U.S.C. § 2104 and Supreme Court Rule 13.1 because it is being filed within 90 days after the denial of certiorari by the Colorado Supreme Court. This Court has jurisdiction to review the state court judgment from Colorado pursuant to 28 U.S.C. § 1257.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provision at issue is Colo. Rev. Stat. § 8-43-201 (2008), which states as follows:

> The director and administrative law judges employed by the office of administrative courts in the department of personnel shall have original jurisdiction to hear and decide all matters arising under articles 40 to 47 of this title; except that the following principles shall apply: A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; a workers' compensation case shall be decided on its merits; and a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.

Aviado alleges that the above statute violates the separation of powers doctrine which has its basis in

Article III of the United States Constitution, which provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Colorado follows federal law regarding the separation of powers and also has its own constitutional provision, Article III, setting forth the separation of powers as follows:

> The powers of the government of this state are divided into three distinct departments, – the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Another constitutional provision in Colorado that is relevant is § 9 of Article VI, which provides as follows:

> (1) The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate,

> and criminal cases, except as otherwise provided herein, and shall have such appellate jurisdiction as may be prescribed by law.

Section 20 and § 25 of Article VI of the Colorado Constitution are also relevant and the full text of those provisions is in the appendix.

Due process and equal protection are also at issue in this case. The relevant United States Constitution provision is § 1 of Amendment Fourteen, which provides as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant provision of the Colorado Constitution is § 25 of Article II, which provides as follows:

> No person shall be deprived of life, liberty or property, without due process of law.

The following statutes from the Colorado Revised Statutes are involved in this case and are fully set out in the Appendix: Colo. Rev. Stat. §§ 8-1-102, 8-40-102, 8-47-101, 24-30-1001, and 24-30-1003 (2008).

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STATEMENT OF THE CASE

This is a workers' compensation case from the state of Colorado. Rosario Aviado worked as an assembler for Ensicon Corporation. She was diagnosed with work-related bilateral carpal tunnel syndrome. Ensicon and its insurance company, Wausau, admitted the injury was work-related. Aviado received medical and temporary wage loss benefits that were paid by Wausau.

Due to concerns that surgery would not be successful, Aviado declined surgery. Her physician placed her medical condition at maximum medical improvement. Her temporary wage loss benefits ended and she was paid permanent partial disability benefits in the amount of $5,020.33.

Due to the permanent work restrictions from the injury, an expert determined that Aviado was unable to earn a wage. Aviado applied for a hearing regarding permanent total disability benefits. If she succeeded in her claim for permanent total disability, she would receive monetary benefits and medical care for her injury for the remainder of her life absent a change in her condition. The present value of the lifetime monetary benefits is more than $150,000.00.

As required by Colorado law, Aviado's application for hearing for permanent total disability was filed in the Office of Administrative Courts, which is in the executive branch of Colorado's government. Colo. Rev. Stat. § 8-43-201 (2008). The Office of Administrative Courts is not in the Division of Workers'

Compensation, which is a separate executive branch agency. Colo. Rev. Stat. § 8-47-101 (2008); Colo. Rev. Stat. § 24-30-1001 (2008). Judges in the Office of Administrative Courts are hired by the Executive Director of the Department of Personnel. Colo. Rev. Stat. § 24-30-1003 (2008). The judges are not subject to the selection and retention provisions of the Colorado Constitution to which judicial branch judges are subject. Colo. Const. art. VI, §§ 20, 25. The judges in the Office of Administrative Courts are subject to performance reviews. Colo. Rev. Stat. § 24-30-1003(4)(a) (2008).

The parties proceeded to hearing. Ensicon did not plead the affirmative defense of unreasonable refusal of medical treatment. No questions were asked at hearing regarding the affirmative defense that was not pled. Ensicon argued in a position statement after the evidence had been submitted that Aviado had unreasonably refused medical treatment. Aviado objected. The administrative law judge (ALJ) issued an order denying Aviado's request for permanent benefits. In doing so, the ALJ relied on the affirmative defense that was not pled by Ensicon.

Aviado appealed to the Industrial Claim Appeals Office (ICAO). The ICAO is another executive branch agency. Colo. Rev. Stat. § 8-1-102 (2008). Among other things, Aviado argued the reliance on an affirmative defense that was not timely pled was reversible error. The ICAO ruled that the ALJ's error was harmless and affirmed the ruling. Aviado timely filed a notice of appeal with the court of appeals.

At this point Aviado exited the executive branch and entered the judicial branch. Aviado could now raise constitutional issues because neither the ALJ nor the ICAO has jurisdiction over constitutional issues. *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

Aviado challenged the jurisdiction of the executive branch judges based on the separation of powers doctrine and equal protection of the laws citing the Colorado and United States Constitutions. Aviado alleged that the constitutions required that judicial branch judges must hear and determine workers' compensation cases. Aviado cited many federal cases including *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Colorado follows federal law regarding separation of powers. *Dee Enterprises v. ICAO*, 89 P.3d 430 (Colo. App. 2003). The federal question regarding separation of powers was timely raised at this point in the proceedings.

The Colorado judicial branch, however, has a history of political activism aimed at keeping workers' compensation judges out of the judicial branch. The following history was placed in an affidavit to the court of appeals and accepted as true by the court of appeals.

Legislative transcripts from 1996 document that the judicial branch lobbied against having workers' compensation judges in the judicial branch when a bill before the legislature would have required such judges to be placed in the judicial branch. The judicial branch went on the record at a legislative committee hearing stating, "we don't want the work." Although the bill passed through the committee over the objection of the judicial branch, the judicial branch enticed the legislator proposing the bill to restructure the bill so it would drive a fiscal note. The judicial branch knew a fiscal note would kill the bill. The judicial branch used an effective political strategy that worked.

In 2001, a legislative task force convened to address civil justice reform. The Director of the Division of Administrative Hearings, which is now called the Office of Administrative Courts, testified that, "I know the judicial branch has been offered the administrative hearings' function a number of times over the years and they've resisted that."

Then a case went through the Colorado appellate courts challenging the jurisdiction of executive branch judges who hear workers' compensation matters. *Dee Enterprises v. ICAO*, 89 P.3d 430 (Colo. App. 2003). The chief justice of the Colorado Supreme Court selected the judges who heard the *Dee Enterprises* case which is shown by the asterisks next to the judges' names in the published opinion. *Id.*

The *Dee Enterprises* court ruled the grant of jurisdiction to executive branch judges to hear workers' compensation claims was not unconstitutional. *Dee Enterprises v. ICAO*, 89 P.3d 430 (Colo. App. 2003). In doing so, the court relied on federal law, making the issue a federal question. *Id.* The *Dee Enterprises* court ruled workers' compensation proceedings involve public rights. *Id.* at 435-437. This is directly contrary to this Court's holding that workers' compensation proceedings involve private rights. *Crowell v. Benson*, 285 U.S. 22, 51 (1932). Because workers could sue employers for injuries at common law, the *Dee Enterprises* opinion is directly contrary to this Court's holding that actions available at common law must be tried in the judicial branch. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

The above-related facts, among others, were set forth in a motion for disqualification of judges that was filed in this case at the court of appeals. App. 96-114. Aviado requested that the court acknowledge the facts showing the partiality of the judicial branch and invoke the rule of necessity to hear the case. Aviado moved for the disqualification based on Canon 3 of the Colorado Code of Judicial Conduct and Rule 97 of the Colorado Rules of Civil Procedure. The court of appeals accepted the facts put forth as true, yet denied the motion stating:

> The fact, if it is one, that the judicial branch has opposed the transfer of Administrative Law Judges into the judiciary is not a basis to conclude that the judges of this court, including the division now assigned to the case, cannot be impartial.

App. 67.

Aviado filed a motion for reconsideration to which the court responded:

> Claimant asserts the court did not employ the appropriate standard in denying the motion for disqualification. The court disagrees. The statement in the previous order that "The fact, if it is one" was meant to convey that the court accepted that the asserted fact was true. Even assuming that fact to be true, the court perceived and continues to perceive no appearance of impropriety that would require disqualification.

App. 70.

The court of appeals then issued a published opinion wherein it did not mention the motion regarding judicial bias or that it had denied such motion. App. 1-15. The court of appeals ruled that the *Dee Enterprises* opinion was persuasive and did not directly confront Aviado's arguments regarding the errors in the *Dee Enterprises* opinion. App. 9-10. Because the court below relied on the *Dee Enterprises* opinion which includes an in-depth analysis of federal law and a reliance on such law, there is a federal question in this case. *Three Affiliate Tribes v. World Engineering P.C.*, 467 U.S. 138 (1984). The court of appeals failed to rule on the equal protection argument that was raised.

Aviado filed a petition for rehearing. The petition included the equal protection argument that the court had failed to rule on and cited the United States

Constitution to support the equal protection claim. The petition argued that it was error for the court not to address the recusal issue or the alleged errors in the *Dee Enterprises* opinion in the published opinion. The petition for rehearing was denied.

Aviado filed a petition for certiorari with the Colorado Supreme Court. The petition stated that the motion for disqualification applied to the supreme court and the motion was attached to the petition. A federal basis for the motion for disqualification was not cited, however, until the reply regarding the petition was filed. In the reply a due process violation of the United States Constitution was alleged along with a citation to this Court's opinion in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. ___, 129 S. Ct. 2252 (2009).

It is the law in Colorado that a judge must rule on a recusal motion before ruling on anything else. Colo. R. Civ. Pro. Rule 97; *Johnson v. District Court In and For Jefferson County*, 674 P.2d 952, 955 (Colo. 1984). Nevertheless, without ruling on the motion for disqualification, the Colorado Supreme Court denied certiorari.

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REASONS FOR GRANTING THE PETITION

This Court has not issued an opinion regarding the effect of a judicial branch entering the political arena in an attempt to evade duties that are historically and constitutionally delegated to such branch.

Does the political agenda of Colorado's judicial branch create a constitutionally intolerable probability of actual bias in violation of the Fourteenth Amendment of the United States Constitution when a party argues before the branch that it is constitutionally required to do what it has lobbied against? Does the fact that the judges in this case issued a published opinion without disclosing the motion for disqualification or any of the facts supporting it affect the decision regarding bias? This Court needs to address what happens to fairness and impartiality when a judicial branch takes a political turn. This is an important federal question.

Colorado adheres to federal law regarding separation of powers. *Dee Enterprises v. ICAO*, 89 P.3d 430, 435-438 (Colo. App. 2003). An employee could sue an employer at common law for a work injury. Colo. Rev. Stat. § 8-40-102 (2008). Therefore, Aviado is entitled to a judicial branch judge in her workers' compensation case. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). By forcing workers' compensation litigants to have their cases heard in the executive branch, Colorado's judicial branch has violated the separation of powers doctrine. This is an important federal question.

A judicial branch's lack of desire for work should not trump constitutional rights. There is no rational basis for overcoming an equal protection challenge in this matter. Colorado follows federal law regarding equal protection. *Tassian v. People,* 731 P.2d 672, 674 (Colo.1987). This is an important federal question.

This Court should hear this case to ensure a fair and impartial decision is rendered and to ensure that federal law has been correctly followed.

A. This case has not been heard by a fair and impartial tribunal.

The Due Process Clause in the Fourteenth Amendment to the United States Constitution guarantees a fair and impartial tribunal. *In re Murchison,* 349 U.S. 133, 136 (1955); *Bracy v. Gramley,* 520 U.S. 899, 904-05 (1997). Objective standards must be used regarding the recusal. *Caperton v. A.T. Massey*, 556 U.S. ___, 129 S. Ct. 2232, 2263 (2009). The question to be answered is whether there is a constitutionally intolerable probability of actual bias. *Id.*

The following facts, among others, were accepted to be true by the Colorado Court of Appeals in this matter: The Colorado judicial branch 1) publicly opposed a bill that would have placed workers' compensation judges in the judicial branch, 2) convinced the sponsor of the bill to change it so it required a fiscal note which killed the bill in the appropriations committee, 3) resisted other attempts at putting workers' compensation judges in the judicial branch, and 4) selected a panel of judges who heard the issues in a previous case. Although the court of appeals accepted these facts as true, the court denied a motion for disqualification and issued a published opinion without revealing in the opinion that any such motion was ever made. These are not the actions of the fair and impartial forum that is required by the due process clause of the Fourteenth Amendment to the United States Constitution.

The actions of the Colorado judicial branch lead to a conclusion that there is a constitutionally intolerable probability of actual bias in the Colorado judicial branch and the opinion below must be reversed.

> "[P]ublic confidence in the judiciary is indispensable to the operation of the rule of law; yet this quality is placed in risk whenever judges step outside the courtroom into the vortex of political activity. . . .
>
> Concern with the entanglement of the judicial and executive power of the United States is no passing phenomenon: The Framers themselves feared consolidation of such authority in the hands of individuals. Madison, quoting Montesquieu, warned that "'were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.'" The Federalist No. 47, at 303 (Mentor ed. 1961) (emphasis original). Hamilton reiterated that "liberty . . . would have everything to fear from [the judiciary's] union with either of the other departments." The Federalist No. 78, at 466; see Note, Constitutional Infirmities, 96 Yale L.J. at 1383-84.

> The aura of judicial impartiality must be conserved for the judiciary's core function, the resolution of cases or controversies. Because "confidence in the disinterestedness of [its] judicatory functions" is central to the judiciary's effectiveness, judges must remain free of external influences and thereby be allowed to act and be perceived as acting in a neutral and impartial manner. Frankfurter, Advisory Opinions, in 1 Encyclopedia of the Social Sciences 475, 478 (1930). For this reason, political involvement by judges is severely limited.

Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1262-1263 (9th Cir. 1988).

The judicial branch is intended to implement the policies that the political branches create. *Premier Elec. Const. Co. v. Nat'l Elec. Contractor's Ass'n, Inc.*, 814 F.2d 358, 375 (7th Cir. 1987). The judicial branch is not to be a political entity but is to refrain from political activity so it can be perceived as fair and impartial. *Id.*; *Gubiensio, supra.*

The phrase used by Colorado's judicial branch in the legislative committee hearing where a bill would have required workers' compensation judges to be in the judicial branch was, "WE don't WANT the work." (emphasis added). This is a statement of desire; not a statement of a properly thought out legal conclusion. The other statement in a legislative hearing was, "I know the JUDICIAL BRANCH has been offered the administrative hearings' function a number of times over the years and THEY'VE RESISTED that." (emphasis added). The statement shows again that the judicial branch is acting as an organization that is resisting having workers' compensation judges being placed in the judicial branch. This case is different from other cases that have previously come before this Court because this case involves a judicial branch's improper desire. In other words, this case involves the Colorado judicial branch's publicly stated partiality toward keeping workers' compensation judges out of the judicial branch.

The judges in this case did not perceive an appearance of impropriety in the fact that they were members of the Colorado judicial branch, which is the organization that had lobbied against having workers' compensation judges in the judicial branch. App. 70. Evidence of membership in an organization, however, is relevant on the issue of bias. Mere evidence of membership in an organization, even without proof that the person has adopted the organization's tenets, is probative of bias. *U.S. v. Abel*, 469 U.S. 45 (1984) (evidence of membership in prison gang probative of witness' bias toward defendant). The state of Colorado agrees the membership in an organization is probative of bias. *People v. James*, 117 P.3d 91, 94 (Colo. App. 2004) (evidence regarding gang affiliations admissible to show motive); *People v. Hall*, 107 P.3d 1073, 1077 (Colo. App. 2004) (citing *U.S. v. Abel*, 469 U.S. 45 (1984)). Therefore, membership in the judicial branch is probative of bias in this instance because the judicial branch lobbied as an organization against workers' compensation judges being in the judicial branch.

The bias issue is a federal question. The court below did not rely on an independent state ground for its failure to recuse. It ruled that there was not an appearance of impropriety, which is simply a more stringent standard than is required by the federal constitution as opposed to a completely independent standard. The merits of a federal question have been reached in this case because a fair and impartial tribunal is constitutionally required. *See Ulster County Court v. Allen*, 442 U.S. 140, 154 (1979) (if state court does not indicate state bar to federal constitutional claim, then this Court does not disrespect the state by entertaining the claim); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (Supreme Court will not assume state court decision rests on adequate and independent state grounds); *Florida v. Powell*, ___ U.S. ___, 130 S. Ct. 1195 (2010) (because state court opinion did not indicate clearly and expressly that it was alternatively based on bona fide separate, adequate and independent state grounds, Supreme Court has jurisdiction). Furthermore, the motion for disqualification of judges was also addressed to the Colorado Supreme Court with the citation to the Fourteenth Amendment to the United States Constitution in the argument. The Colorado Supreme Court's improper failure to rule on the motion should not prohibit a federal question in this matter.

There is a constitutionally intolerable probability of actual bias in the opinion below. If a handgun ban was at issue and the tribunal hearing the issue was the National Rifle Association, there would be a constitutionally intolerable probability of actual bias because the organization hearing the matter favors guns. If segregation was at issue and the tribunal hearing the issue was the Ku Klux Klan, there would be a constitutionally intolerable probability of actual bias because the organization hearing the matter favors white supremacy. Likewise, there is a constitutionally intolerable probability of actual bias in this case because the judges below are part of the organization that has publicly resisted workers' compensation judges being placed in the judicial branch. Furthermore, the judges below did not take actions to distance themselves from the actions of the judicial branch or take any steps to try to reduce the appearance of impropriety. The judges below issued a published opinion that makes it look like the motion was never made. Furthermore, the published opinion does not even address all of the arguments that were made by Aviado.

This Court should vacate the result below and hear this case on the constitutional issues that have been presented. Even if this Court does not choose to hear the disqualification issue, the separation of powers issue in this matter is an independent federal question that should be heard by this Court.

B. Colorado relies on federal law regarding separation of powers but issued an opinion contrary to the rulings of this Court.

Colorado relies on federal law regarding separation of powers. *Dee Enterprises v. ICAO*, 89 P.3d 430, 435-437 (Colo. App. 2003). Colorado's reliance on federal law regarding separation of powers is sufficient to support jurisdiction of this Court. *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 106 (2003). Colorado ruled that this Court's decision in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) compelled its result in the *Dee Enterprises* case regarding separation of powers. *Dee Enterprises*, 89 P.3d at 436-437. Because a federal case is compelling the result of the state court, this Court has jurisdiction. *Michigan v. Long*, 463 U.S. 1032, 1044 (1983). Whether a state court correctly applies opinions of this Court is a federal question. *American Trucking Assoc., Inc. v. Smith*, 496 U.S. 167, 177 (1990). Therefore, the separation of powers issue in this case is a federal question and this Court has jurisdiction to hear the issue.

Workers' compensation proceedings involve private rights. *Crowell v. Benson*, 285 U.S. 22, 51 (1932). In direct contradiction to this Court, Colorado has ruled that workers' compensation matters regard public rights. *Dee Enterprises*, 89 P.3d at 436-437. Suits that arose at common law regarding private rights must be heard before a judicial branch judge. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In direct contradiction to this

Court, Colorado has determined that workers' compensation proceedings, which arose at common law and regard private rights, may be adjudicated by executive branch judges who are not subject to de novo review. *Dee Enterprises,* 89 P.3d at 437. This Court needs to correct Colorado's erroneous interpretation of federal law.

A state may distribute its powers as it desires. *Crowell,* 285 U.S. at 295. Article III of the United States Constitution and Article III of the Colorado Constitution are similar and Colorado relies on federal law for a resolution of separation of powers issues. *Dee Enterprises,* 89 P.3d at 435. The similarity of the constitutional provisions plus the reliance by the state on federal law interpreting the provisions means a federal question is at issue. *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 106 (2003) (Supreme Court had jurisdiction where state court noted similarity of equal protection and relied on federal law in interpreting equal protection).

It should be noted, however, that the Colorado Constitution addresses the separation of powers in two separate provisions. Article III of the Colorado Constitution provides that there are three distinct departments and no powers belonging to one can be exercised by either of the others except when the constitution expressly directs or permits. Colo. Const. art. III. Section 9 of Article VI provides that the district court shall be the trial court with general jurisdiction over all civil cases except as otherwise provided in the constitution. Colo. Const. art. VI,

§ 25. Both provisions provide that any exception to the separation of powers needs to be in the constitution. Nowhere in the Colorado Constitution is there a provision allowing workers' compensation proceedings to be heard in the executive branch. Nevertheless, the Colorado judicial branch has determined that an analysis of federal law allows for workers' compensation proceedings to be heard in the executive branch. *Dee Enterprises,* 89 P.3d at 435-438. The analysis, however, is flawed.

The analysis begins with *Crowell v. Benson*, 285 U.S. 22 (1932). *Crowell* involved a workers' compensation proceeding in maritime jurisdiction. An executive branch agency determined a worker, Knudsen, was in the employ of Benson at the time of an injury. *Crowell,* 285 U.S. at 37. Using the procedure provided in the Longshoremen's and Harbor Workers' Compensation Act, Benson sought an injunction in federal district court. The district court held a trial de novo and determined Knudsen was not in the employ of Benson at the time of the injury. *Crowell,* 285 U.S. at 37.

The *Crowell* Court determined that workers' compensation proceedings involved private rights as opposed to public rights. *Crowell,* 285 U.S. at 51. The Crowell Court determined that the judge did not err in permitting a trial de novo on the issue of employment. *Crowell,* 285 U.S. at 65. Specifically, the Court stated:

> We think that the essential independence of the exercise of the judicial power of the United States, in the enforcement of constitutional rights requires that the federal court should determine such an issue upon its own record and the facts elicited before it.

Crowell, 285 U.S. at 64.

The public vs. private right distinction was again addressed in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The *Northern Pipeline* Court determined that executive branch bankruptcy judges violated Article III because the jurisdiction of the judges extended to private rights suits that existed at common law that were included as part of the bankruptcy act. *Northern Pipeline,* 458 U.S. at 84. The Court held that Congress cannot withdraw any matter from judicial branch judges if that matter from its nature is subject of a suit at common law. *Northern Pipeline,* 458 U.S. at 67. The Court stated:

> The distinction between public rights and private rights has not been definitively explained in our precedents.[22] Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must, at a minimum, arise "between the government and others." *Ex parte Bakelite Corp., supra,* at 451.[23] In contrast, "the liability of one individual to another under the law as defined," *Crowell v. Benson, supra,* at 51, is a matter of private rights. Our precedents clearly establish that *only*

> controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. *See Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450, n. 7 (1977); *Crowell v. Benson, supra,* at 501. *See also* Katz, Federal Legislative Courts, 43 Harv.L.Rev. 894, 917-918 (1930).[24] Private rights disputes, on the other hand, lie at the core of the historically recognized judicial power.

Northern Pipeline, 458 U.S. at 69-70 (footnotes omitted).

It was argued that *Crowell* stood for the proposition that U.S. Const. Article III was satisfied as long as some degree of appellate review was provided. The *Northern Pipeline* Court did not agree. The Court stated:

> Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level. The Court responded to a similar suggestion in *Crowell* by stating that to accept such a regime, "would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of bureaucratic character alien to our system, wherever fundamental rights depend, as not

> infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

Northern Pipeline, 458 U.S. at n. 39 (citation omitted).

The definitions of public rights and private rights was revised somewhat a few years after *Northern Pipeline*. This Court addressed a statutory scheme under the Environmental Protection Agency in 1985 that allowed litigation in the executive branch. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985). Because the statutory scheme did not replace rights that were available at common law, the Court held the *Northern Pipeline* case was not applicable. *Thomas* held that non Article III adjudication was appropriate because a public right that was statutorily created was at issue even though the statutory right was created between two parties. *Id.*

Colorado determined that the *Thomas* case was persuasive regarding workers' compensation actions being public as opposed to private rights. *Dee Enterprises,* 89 P.3d at 437. *Thomas* did not overrule *Crowell*, however, and in fact the *Thomas* Court maintained the holding in *Crowell* regarding workers' compensation proceedings, but differentiated *Crowell* from the facts at issue in *Thomas*.

> In assessing the degree of judicial involvement required by Article III in this case, we note that the statute considered in *Crowell* is different from FIFRA in significant respects.

> Most importantly, the statute in *Crowell* displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire. Thus it clearly fell within the range of matters reserved to Article III courts under the holding of *Northern Pipeline*.

Thomas, 473 U.S. at 587. Therefore, *Thomas* expressly did not overturn the holding in *Crowell* that workers' compensation matters involved private rights. The contention in the *Dee Enterprises* case that workers' compensation matters involve public rights is clearly erroneous. *Dee Enterprises,* 89 P.3d at 437.

Based on the erroneous conclusion that workers' compensation matters involve public rights, *Dee Enterprises* determined that de novo review by a judicial branch judge was no longer required. *Id.* This is clearly erroneous because workers' compensation involves private rights. *Crowell,* 285 U.S. at 51. Workers' compensation judges are not subject to de novo review in Colorado. Colo. Rev. Stat. §§ 8-43-301, 8-43-308 (2008). Workers' compensation judges in Colorado are subject to performance reviews in the executive branch. Colo. Rev. Stat. § 24-30-1003(4) (2008). Workers' compensation litigants in Colorado are entitled to have a judicial branch judge determine their cases. *Northern Pipeline, supra*; *Crowell, supra.*

Furthermore, it must be noted that a citation by the *Dee Enterprises* court regarding de novo review is not accurate. On page 437 of the *Dee Enterprises* case, the court cites the following: "*cf. Huizar v. Allstate Ins. Co.*, 952 P.2d 342 (Colo. 1998) (de novo review of workers' compensation claims not required)." *Dee Enterprises*, 89 P.3d at 437. The *Huizar* case, however, is not a workers' compensation case. The *Huizar* case regards a trial de novo clause in an uninsured motorist provision of an automobile insurance policy. The case has nothing to do with workers' compensation. *Huizar v. Allstate Ins. Co.*, 952 P.2d 342 (Colo. 1998).

In 1986, this Court addressed the issue of availability of a procedure without an Article III judge. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). The *Schor* case involves reparations proceedings that injured persons may take part in if they were injured by a commodity broker's violation of the Commodity Exchange Act. The proceedings were voluntary and not required. The *Schor* Court held that by electing to proceed before the commission that the parties willingly submitted limited jurisdiction of state law claims as a necessary incident to the adjudication of federal claims. *Id.* It is key to the *Schor* Court's analysis that the parties were not forced into the procedure. *Id.* There is no such election in workers' compensation proceedings in Colorado as the parties are forced to have their cases heard in the executive branch. Colo. Rev. Stat. § 8-43-201 (2008).

Colorado has held that workers' compensation litigants have waived their right to a judicial branch judge because the Workers' Compensation Act states that the parties have expressly surrendered their common law rights. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Dee Enterprises*, 89 P.3d at 439. It is erroneous to conclude that Aviado waived her right to a judicial branch judge. This Court envisioned a scenario such as the one presented here. In a case regarding sovereign immunity, Justice Scalia, who wrote the opinion for the Court, stated the following:

> Indeed, *Parden*-style waivers are simply unheard of in the context of *other* constitutionally protected privileges. As we said in *Edelman*, "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." 415 U. S., at 673. *For example, imagine if Congress amended the securities laws to provide with unmistakable clarity that anyone committing fraud in connection with the buying or selling of securities in interstate commerce would not be entitled to a jury in any federal criminal prosecution of such fraud. Would persons engaging in securities fraud after the adoption of such an amendment be deemed to have "constructively waived" their constitutionally protected rights to trial by jury in criminal cases? After all, the trading of securities is not so vital an activity that any one person's decision to trade cannot be regarded as a voluntary choice. The answer, of course, is no. The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst*, 304

> U. S. 458, 464 (1938). "[C]ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U. S. 389, 393 (1937). See also *Ohio Bell Telephone Co. v. Public Util. Comm'n of Ohio*, 301 U. S. 292, 307 (1937) (we "do not presume acquiescence in the loss of fundamental rights"). State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected. *Great Northern supra* at 51; *Pennhurst*, 465 U. S., at 98. And in the context of federal sovereign immunity – obviously the closest analogy to the present case – it is well established that waivers are not implied. See, e.g., *United States v. King*, 395 U.S. 1, 4 (1969) (describing the "settled propositio[n]" that the United States waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). We see no reason why the rule should be different with respect to state sovereign immunity.

College Sav. Bank v. Flor. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 681-682 (1999). Aviado has never expressly waived anything. Aviado's right to a district court trial at common law is equivalent to a criminal defendant's right to a jury trial. Aviado's action at common law would have been a civil action. The legislature cannot take away the right to appear in district court that existed at common law by relabeling the action and placing exclusive jurisdiction of the action in an administrative agency. *See*

Granfinanciera v. Nordberg, 492 U.S. 33 (1989) ("Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." p. 61). Colo. Rev. Stat. § 8-43-201 is unconstitutional because it eliminates Aviado's constitutional right to a trial in district court.

How workers' compensation cases are heard varies from state to state. In 1990 a case was heard in Louisiana where a challenge was made to an executive branch agency that was to determine such cases. *Moore v. Roemer*, 560 So.2d 927 (La.App. 1 Cir. 1990). The court determined that workers' compensation matters were civil in nature and therefore had to be heard in the district court. *Id.* A similar challenge was made in Colorado, but the Colorado Court of Appeals determined that workers' compensation cases are not civil matters under the Colorado constitution. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002). The matter was addressed in the *Dee Enterprises* case as well. The *Dee Enterprises* court stated that it was not aware of any intent by the General Assembly to regard workers' compensation matters as civil proceedings. *Dee Enterprises*, 89 P.3d at 439. The statutory language in Colorado, however, is very similar to the statutory language in Louisiana that convinced the Louisiana court that workers' compensation is a civil matter. Colo. Rev. Stat. § 8-43-307(2) is part of the enabling statute allowing the court of the appeals to hear workers' compensation appeals. The statute states that, "such actions shall be tried and determined by the court of appeals in the manner provided for other civil actions." Colo. Rev. Stat. § 8-43-307(2). Louisiana interpreted "other civil" matters to mean workers' compensation was a civil matter. *Moore v. Roemer*, 560 So.2d 927 (La.App. 1 Cir. 1990). Therefore, Colorado has almost the identical situation as Louisiana yet the two states determined the matter differently.

Alabama recognizes that workers' compensation cases are filed, "in the circuit court of the county which would have jurisdiction of an action between the same parties arising out of tort." Alabama Code of 1975 § 25-5-88. And some states have jury trials. *See* Tex. Lab. Code Ann. § 410.304. In Wyoming, workers' compensation is determined in the executive branch, but a judge wrote a concurring opinion that addressed separation of powers and subsidiary functions of an agency.

> In this instance, if the hearing examiner is part of the Workers' Compensation Division, as the agency, she is acting incidental as subsidiary to the function of the agency (making her recommendations to the agency for agency action as required by W.S. 16-3-112), and the separation of powers provision of the constitution is not violated. However, if the office of hearing examiner is an "agency" within itself, then, since its only function is judicial, and with the hearing

> examiner's action not being incidental or subsidiary to any other function of the agency, i.e., the hearing examiner, a violation of the separation of powers provision of the constitution would result.

State of Wyoming v. Halstead, 795 P.2d 760, 770-771 (Wyo. 1990) (Justice Rooney specially concurring in part and dissenting in part).

The scenario addressed by Justice Rooney in Wyoming is the current status in Colorado. The Office of Administrative Courts is an agency with solely a judicial function. As Justice Rooney stated, the result is a violation of the separation of powers.

C. Aviado is not receiving equal protection of the laws.

Pursuant to the Fourteenth Amendment of the United States Constitution, no state may deny any person the equal protection of the laws. Article II, Section 25 of the Colorado Constitution also guarantees the right to equal protection. *Sigman v. Seafood Ltd. P'ship I,* 817 P.2d 527, 532 (Colo. 1991). Equal protection guarantees assure that people who are similarly situated will receive similar treatment under the law. *Id.* Colorado follows the United States Supreme Court in construing equal protection under the Colorado Constitution. *Tassian v. People*, 731 P.2d 672, 674 (Colo. 1987). The similarity of the constitutional provisions plus the reliance by the state on federal law interpreting the provisions means a federal question is at issue. *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 106 (2003) (Supreme Court had jurisdiction where state court noted similarity of equal protection and relied on federal law in interpreting equal protection).

An equal protection challenge was raised below but the court of appeals failed to rule on the argument. The argument was also made to the supreme court which denied certiorari. Because the argument was made, the court's failure to rule on the argument below does not deprive this Court of jurisdiction. *Dewey v. Des Moines*, 173 U.S. 193, 200 (1899) (if the court below did not in terms deny such argument, if the necessary effect of its judgment was to deny it, then it would be enough to provide jurisdiction).

Colo. Rev. Stat. § 8-43-201 violates equal protection of the laws because it provides the executive branch the authority to determine workers' compensation matters. All other litigants and injured people in Colorado have their claims determined in the judicial branch where the judges are subject to the selection and retention provisions in Article VI of the Colorado Constitution. Workers' compensation litigants are similarly situated to these other litigants. Colo. Rev. Stat. § 8-43-201 discriminates against workers' compensation litigants by denying them judges subject to the selection and retention provisions. Judges who hear workers' compensation cases are hired by the Director of the Department of Personnel and are subject to performance reviews in the executive branch. Colo. Rev. Stat. § 24-30-1003 (2008).

No argument is made for a heightened standard under equal protection. Therefore, the test is whether there is a rational basis for the statute at issue. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-458 (1988); *Tassain*, 731 P.2d at 675.

> The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state. Rather, the Equal Protection Clause is offended only if the statute's classification "rests on grounds wholly irrelevant to the achievement of the State's objective."

Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 70-71 (1978) (citations omitted). Administrative convenience is not a legitimate governmental purpose. *See Tassian*, 731 P.2d at 676.

The Office of Administrative Courts is a separate agency from the Division of Workers' Compensation in Colorado's executive branch. Colo. Rev. Stat. §§ 8-43-201, 24-30-1001 (2008). The judges in the Office of Administrative Courts work solely as judges. There is no rational basis for this court to be in the executive branch as opposed to the judicial branch. If the objective of the court is to provide the quick and efficient delivery of benefits, then the placement of the court in the executive branch is wholly irrelevant to the achievement of the state's objective. *See Holt*

Civic Club, 439 U.S. at 70-71. If the court were in the judicial branch it would operate as quickly and effectively as it does in the executive branch.

Colorado's placement of the Office of Administrative Courts in the executive branch violates workers' compensation litigants' right to equal protection of the laws.

◆

CONCLUSION

For all the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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COLORADO COURT OF APPEALS

Court of Appeals No.: 08CA0923
Industrial Claim Appeals Office of the
State of Colorado
WC No.: 4-685-483

Rosario Aviado,

Petitioner,

v.

Industrial Claim Appeals Office of the
State of Colorado, Ensicon Corporation,
and Wausau Insurance Corporation,

Respondents.

ORDER AFFIRMED

Division II
Opinion by: JUDGE CASEBOLT
Roy and Connelly, JJ., concur

Announced: April 16, 2009

Chris Forsyth Law Office, LLC, Chris Forsyth, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Moseley, Busser & Appleton, P.C., Scott M. Busser, Denver, Colorado, for Respondents Ensicon Corporation and Wausau Insurance Corporation

In this workers' compensation proceeding, Rosario Aviado (claimant) seeks review of that part of the final order issued by the Industrial Claim Appeals Office (Panel) that denied her claim for permanent total disability (PTD) benefits. We affirm.

I. Background

Claimant sustained an admitted injury to her bilateral upper extremities and suffers from bilateral carpal tunnel syndrome. She underwent a division-sponsored independent medical examination (DIME). The DIME physician opined that claimant's impairment did not extend beyond her extremities and rated the right arm at seven percent impairment and the left arm at four percent impairment. Ensicon Corporation and its insurer, Wausau Insurance Corporation (collectively employer), filed a final admission of liability (FAL) for a scheduled injury based on the DIME rating.

Claimant contested the FAL and sought PTD benefits. Following an evidentiary hearing, the administrative law judge (ALJ) concluded that claimant had failed to meet her burden of proving that she was permanently and totally disabled and awarded benefits consistent with employer's FAL. The Panel affirmed on review.

II. Surgery Refusal

Claimant first contends that the ALJ erred by denying PTD benefits based on her refusal to undergo surgery, which the ALJ also found to be unreasonable. She asserts that surgery refusal is an affirmative defense that employer did not endorse for hearing. We perceive no reversible error.

Section 8-40-201(16.5)(a), C.R.S. 2008, defines PTD as the claimant's inability "to earn any wages in the same or other employment." Section 8-43-404(3), C.R.S. 2008, permits compensation to be reduced or suspended if the claimant refuses to submit to medical or surgical treatment that is reasonably essential to promote recovery.

Here, the ALJ concluded that claimant's refusal was a bar to her PTD claim. However, the order also contains extensive evidentiary findings supporting the ALJ's additional determination that claimant had failed to prove she has no ability to earn wages. The ALJ correctly described the legal standard for determining PTD, and recognized the necessity of considering the various human factors pertinent to whether claimant is able to earn wages and whether suitable employment is reasonably available in the competitive job market. The ALJ found that claimant retains the ability to perform several jobs in the sedentary category that are reasonably available and require no significant accommodation, and the medical and vocational evidence, albeit conflicting, substantially supports the ALJ's finding. Thus, the findings and conclusions regarding claimant's refusal to undergo surgery were neither essential nor integral to the ALJ's finding that she did not carry her burden of proof.

Because claimant did not sustain her burden of proof, it is unnecessary for us to decide whether claimant's refusal to undergo surgery constituted an affirmative defense and, if so, whether employer waived it by failing to plead, endorse, or otherwise affirmatively raise it. Instead, even if we assume the ALJ erred by determining that claimant's refusal barred the award of any PTD benefits, such error was harmless. *See* § 8-43-310, C.R.S. 2008 (appellate court shall disregard any irregularity or error that does not affirmatively appear to have damaged the complaining party).

III. Evidentiary Error

Claimant next contends that the ALJ erred by excluding her testimony regarding whether a return visit with her treating physician was authorized after employer had a functional capacity evaluation (FCE) prepared. The ALJ sustained employer's objection, finding that the testimony was irrelevant. We perceive no error.

Evidence is relevant if it has any tendency to make the existence of a consequential fact more or less probable. CRE 401. The ALJ has discretion to determine the relevancy of evidence. *See* §§ 8-43-207(1)(c) (ALJs are empowered to make evidentiary rulings), 8-43-210 (Colorado Rules of Evidence apply in all hearings), C.R.S. 2008; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501, 506 (Colo. App. 1995) (ALJ has broad discretion to determine the admissibility of expert testimony, and appellate courts may not overturn a ruling unless it is manifestly erroneous).

Claimant urges that the testimony was relevant because employer's vocational expert relied on the FCE and the ALJ adopted both the treating physician's restrictions and the recommendations of the FCE, finding that they were consistent. Claimant further asserts that employer's objection to the testimony estopped it from later seeking to have the ALJ consider the FCE. However, the ALJ did not limit questioning regarding the FCE and the only offer of proof was claimant's explanation that the testimony would show that employer would not authorize a follow-up visit to the treating physician.

Under these circumstances, we fail to perceive how the question made it more or less likely that the treating physician did or did not agree with the recommendation of the FCE. Therefore, we are satisfied that the ALJ acted within his discretion in sustaining employer's objection to the question on the grounds of relevance and determining that employer was not estopped from seeking consideration of the FCE.

IV. Right to a District Court Hearing

Claimant next contends that she did not expressly waive or surrender her common law rights and was entitled to bring a claim in the district court.

She also contends that portions of the Workers' Compensation Act are unconstitutional. We disagree.

An injured worker's exclusive remedy for injuries that arise out of or in the course of employment is recovery under the workers' compensation statutes. § 8-41-102, C.R.S 2008; *Pizza Hut of Am., Inc. v. Keefe,* 900 P.2d 97, 100 (Colo. 1995). The Act, and specifically its compulsory elimination of common law rights, has been repeatedly held constitutional. *Kandt v. Evans,* 645 P.2d 1300, 1306 (Colo. 1982) (citing cases).

Thus, section 8-41-104, C.R.S. 2008, which creates a conclusive statutory presumption of an employee's acceptance of coverage, has been upheld against constitutional attack, *see Ryan v. Centennial Race Track, Inc.,* 196 Colo. 30, 32, 580 P.2d 794, 795-96 (1978), and it is not required that a claimant be given the option of consenting to a hearing and adjudication by an ALJ. *See Dee Enters. v. Indus. Claim Appeals Office,* 89 P.3d 430, 438 (Colo. App. 2003).

A.

Claimant nevertheless asserts that, at common law, she had the fundamental constitutional right to a hearing in district court under Colorado Constitution article VI, section 9. She asserts that, because district courts have "original jurisdiction in all civil . . . cases, except as provided [in the constitution]," her right to such a hearing cannot be abrogated by a mere statute, but must be abrogated by another provision of the constitution itself or by an amendment thereto. We disagree.

Claimant is correct that, under the cited constitutional provision, the district court has original jurisdiction in civil cases. However, the constitution does not define the term "civil case." Instead, that term is left for the General Assembly to define. *See People ex rel. Terrell v. Dist. Court,* 164 Colo. 437, 443, 435 P.2d 763, 766 (1967) (the constitution does not define the phrase "criminal cases" in article VI, section 9; hence, the legislature has the power to define crimes); *see also People v. Gilliland,* 769 P.2d 477, 480 (Colo. 1989) (while district courts have general jurisdiction over criminal cases, it is the constitutional prerogative of the legislature to define crimes).

A civil action is a judicial proceeding to enforce a private right. *See Hernandez v. Downing,* 154 P.3d 1068, 1070 (Colo. 2007) ("a proceeding on the part of one person, as actor, against another, for the infringement of some right of the first, before a court of justice, in the manner prescribed by the court or law" (quoting *Clough v. Clough,* 10 Colo. App. 433, 439, 51 P. 513, 515 (1897), *aff'd,* 27 Colo. 97, 59 P. 736 (1899))).

Here, the General Assembly essentially has determined that workers' compensation cases are not civil cases that must be heard in a judicial court. *See Whiteside v. Smith,* 67 P.3d 1240, 1248 (Colo. 2003) (workers' compensation claimants cannot litigate their injury claims in civil proceedings); *Barron v.*

Kerr-McGee Rocky Mountain Corp., 181 P.3d 348, 348 (Colo. App. 2007) (an employer that complies with the provisions of the Workers' Compensation Act is immune from all civil actions that may be brought by an employee for a work-related injury); *cf. Colorado Ins. Guar. Ass'n v. Menor,* 166 P.3d 205, 210-11 (Colo. App. 2007) (under statute providing for nonduplication of benefits, Colorado Insurance Guaranty Association had a private civil remedy enforceable in the district court, outside Workers' Compensation Act, to seek offset that would reduce employee's workers' compensation benefits based on employee's uninsured motorist settlement); *Jorgensen v. Colo. Comp. Ins. Auth.*, 967 P.2d 172 (Colo. App. 1998), *aff'd,* 992 P.2d 1156 (Colo. 2000) (jurisdiction to apportion tort settlement proceeds between economic and noneconomic damages so as to determine amount of workers' compensation insurance carrier's right of subrogation lies in the district court; apportionment case is a separate cause of action, not an ancillary proceeding to the workers' compensation case); *Dee Enters.*, 89 P.3d at 439 (no statutory or other provision indicates an intent by legislature to make workers' compensation matters civil proceedings); *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001, 1004 (Colo. App. 2002) (workers' compensation cases are not civil disputes). The General Assembly has the right and power to so determine. *See Terrell,* 164 Colo. at 443, 435 P.2d at 766.

Accordingly, claimant has no right to proceed against employer in the district court, and an express waiver or surrender of any common law rights was not necessary.

B.

Claimant also contends that the Act is unconstitutional because ALJs, who have original jurisdiction under section 8-43-201, C.R.S. 2008, to hear and decide all workers' compensation matters, are employed by the executive branch rather than the judicial branch. She claims that such an arrangement conflicts with the original jurisdiction that is vested in the judiciary under the Colorado Constitution to adjudicate all civil actions. We are not persuaded.

This specific contention was addressed and rejected in *Dee Enterprises,* 89 P.3d at 430, where a division of this court held that (1) the grant of jurisdiction to the ALJs did not require them to exercise functions that were inherently judicial; (2) the workers' compensation statutes create a "public rights" case that is particularly suited to administrative oversight and determination; and (3) the essential functions of the judicial branch are sufficiently protected by the limits placed on the jurisdiction conferred upon the ALJs and the direct appellate review provided for under the Act. The division concluded that the Act poses no substantial threat to the separation of powers and is, therefore, constitutional. *Id.* at 438.

Similar constitutional arguments were made and rejected in *MGM Supply.* In that case, the division distinguished workers' compensation claims from ordinary civil disputes involving private parties and private rights, which must be resolved in the courts, and specifically determined that, by authorizing direct appeal to this court, the Act accommodated any right the parties "may have to have their disputes considered by judges subject to popular vote." 62 P.3d at 1004.

Claimant asserts that *Dee Enterprises* and *MGM Supply* were wrongly decided. We disagree. We regard the analysis in each case to be thorough, well reasoned, and complete, and we discern no indication that either division decided issues not properly before it.

Thus, for the same reasons stated in *MGM Supply* and *Dee Enterprises,* we hold that claimant has failed to prove the Act is unconstitutional. *See Calvert v. Indus. Claim Appeals Office,* 155 P.3d 474, 477 (Colo. App. 2006) (the Act and its provisions are presumed to be constitutional and claimant has the burden to prove otherwise beyond a reasonable doubt).

V. Common Law Action Under Section 8-43-309

Claimant asserts that she should be entitled to pursue an action in the district court against her employer and we must remand for that purpose because we have failed to issue a decision within thirty days after the appeal came at issue, in contravention of section 8-43-309, C.R.S. 2008. Claimant contends that the statute is jurisdictional, not merely directory. We disagree.

The primary goal in construing a statute is to determine and give effect to the intent of the General Assembly. *McKinney v. Indus. Claim Appeals Office*, 894 P.2d 42, 44 (Colo. App. 1995). We must give effect to the General Assembly's purpose and intent as reflected in the plain language of the statute, and we do not depart from the plain meaning unless it leads to an absurd result. In addition, we read and consider the statutory scheme as a whole to give consistent, harmonious, and sensible effect to all its parts. *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004).

Section 8-43-309 provides:

> Actions in court tried within thirty days. Any such action commenced in the court of appeals to set aside or modify any order shall be heard within thirty days after issue shall be joined, unless continued on order of the court for good cause shown. No continuance shall be for longer than thirty days at one time.

We first note that nothing in the statute defines the phrase directing that the action "shall be heard" within thirty days. The statute does not say whether a decision must be rendered or, instead, whether oral argument must be held within that time. Nor does the statute provide a time frame for cases in which no oral argument occurs. And, as an appellate court, we do not "try" cases as the heading of the statute appears to direct. Instead we review cases in which a trial or evidentiary hearing has already occurred. Nevertheless, we will assume the statute requires that some action toward resolution of the case must be taken within thirty days following the date that "issue shall be joined."

Generally, a case is "at issue" in this court when the reply brief is filed. Using that as the triggering date, the record reveals that no action toward deciding this case was taken within that thirty-day period, and no orders were issued extending the thirty-day period. Assuming, therefore, that the statute has been violated, we then turn to whether the statute is jurisdictional and mandatory, or, instead, merely directive.

"There is no universal rule by which directory provisions may, under all conditions, be distinguished from those which are mandatory. The intention of the legislature, however, should be controlling. . . ." *Danielson v. Castle Meadows, Inc.*, 791 P.2d 1106, 1113 (Colo. 1990) (quoting 1A N. Singer, *Sutherland Statutory Construction* § 25.03, at 441-42 (4th ed. 1984)).

Whether the General Assembly intends a statutory provision to be directory or jurisdictional requires consideration of "the legislative history, the language of the statute, its subject matter, the importance of its provisions, their relation to the general object intended to be accomplished by the act, and, finally, whether or not there is a public or private right involved." *DiMarco v. Dep't of Revenue,* 857 P.2d 1349, 1351-52 (Colo. App. 1993) (quoting *Application of Rosewell,* 97 Ill. 2d 434, 440, 454 N.E.2d 997, 999 (1983)). Applying this analysis here, we conclude for multiple reasons that the provision at issue was intended by the General Assembly to be directory and not mandatory or jurisdictional.

First, while the statute directs that an action "shall" be heard, and "shall" generally indicates that a provision is mandatory, *see People v. Dist. Court,* 713 P.2d 918, 921 (Colo. 1986), nevertheless, courts "have generally construed time limitations imposed on public bodies as being directory rather than mandatory." *DiMarco,* 857 P.2d at 1352.

Second, affirmative language such as "shall be held within" is indicative of a directory construction. *Id.*; *see Burns v. Bd. of Assessment Appeals,* 820 P.2d 1175, 1177-78 (Colo. App. 1991) (requirement that a ruling must be rendered "within" twenty days is directory).

Third, the statute does not state that this court loses jurisdiction after the thirty-day period expires, and nothing in the statutory language suggests that it is jurisdictional in nature. *See Mahaffey v. Barnhill,* 855 P.2d 847, 849 (Colo. 1993) (statute directing that court shall commence trial not more than twenty days after joining of issue is directory, not mandatory).

Fourth, courts will construe a statute to limit jurisdiction only when that limitation is explicit. *See In re Fisher*, ___ P.3d ___, ___ (Colo. No. 07SA383, Feb. 9, 2009) (C.R.C.P. 251.19, which provides that attorney disciplinary hearing board shall prepare an order within sixty days after the hearing is not jurisdictional); *In re A. W.*, 637 P.2d 366, 374 (Colo. 1981) ("While jurisdiction may be limited by the legislature, no statute will be held to so limit court power unless the limitation is explicit."); *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996) (statute stating that ALJ "shall" enter written summary order denying or allowing a workers' compensation claim within fifteen days after conclusion of a hearing is directory, not mandatory).

Fifth, claimant's request for a remand to a tribunal that has never before heard the matter would leave unresolved whether such a remand would require the district court to allow a common law proceeding for personal injury or instead to apply the Workers' Compensation Act provisions. And remand is not a stated remedy for any violation of the statute.

Finally, construing the pertinent time limit to be mandatory and jurisdictional would divest this court of authority to decide the dispute. This interpretation would operate to deprive both claimants and employers of the quick and efficient delivery of disability and medical benefits and a timely disposition of their disputes. *See Langton*, 937 P.2d at 885-86.

Hillebrand Construction Co. v. Worf, 780 P.2d 24 (Colo. App. 1989), is distinguishable. There, the statute at issue provided specific consequences if an ALJ did not enter a supplemental order within the statutory period, a factor that the division found determinative. Here, in contrast, nothing in the statute indicates what should happen if the thirty-day period is not observed.

In addition, claimant cannot point to any prejudice resulting from the failure to comply with the statutory provision. Her proposed remedy of remand for a hearing in the district court would prolong the case at significant cost to all parties, contrary to the legislative intent to interpret the Workers' Compensation Act "so as to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation." § 8-40-102(1), C.R.S. 2008.

The order is affirmed.

JUDGE ROY and JUDGE CONNELLY concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-685-483

IN THE MATTER OF THE
CLAIM OF ROSARIO AVIADO,
Claimant

v.

ENSICON CORPORATION,
Employer,

and

WAUSAU INSURANCE
COPRORATION,
Insurer,
Respondents.

FINAL ORDER

The claimant seeks review of an order of Administrative Law Judge Feller (ALJ) dated November 6, 2007, that determined that the claimant is not permanently and totally disabled and that awarded permanent partial disability benefits based upon the respondents' final admission of liability. We affirm.

A hearing was held on the issues of whether the claimant is permanently and totally disabled and, if not, whether the claimant sustained impairment properly measured as a whole person impairment rating. The ALJ entered an order reciting the following procedural history. The claimant sustained the compensable occupational disease of carpal tunnel syndrome with an onset of disability of April 24, 2006. The respondents filed a final admission of liability admitting for benefits based upon five percent extremity impairment of the right arm and three percent extremity impairment of the left. The claimant objected and obtained a Division-sponsored independent medical examination (DIME), which reported that the claimant had sustained extremity impairment equal to seven percent of the right arm and four percent of the left. Although the claimant sought additional impairment of her neck, the DIME physician, Franklin Shih, MD., found no impairment except for the extremity impairment mentioned. The respondents filed a second final admission of liability admitting for the impairment reported by the DIME. The claimant filed an application for hearing endorsing, among other issues, permanent partial disability benefits, and permanent total disability benefits.

The ALJ also entered extensive and thorough findings of fact that it is unnecessary to recite in detail here. However, for the purposes of this order those factual findings may be summarized as follows. The claimant sustained a compensable injury on April 24, 2006, that was later diagnosed as bilateral carpal tunnel syndrome. She was laid off from her position as an assembler several days after her injury. The claimant was born in the Philippines and on her arrival in the United States in 1992 she accepted a job as a server, cashier, and kitchen help in a food court. She worked concurrently at a convenience store, where she "did everything," including cleaning, ordering, stocking and cashiering. She subsequently worked as a temporary filing clerk, where she became proficient in the Microsoft Excel system. She later worked at a retail store processing payroll, completing various "government forms" necessary in connection with the business, and managing negotiations with the business's landlord. Following that in August 2005 she accepted the position with this employer assembling pumps, which she continued doing until April 2006. The ALJ also entered factual findings based upon his observations of the claimant at the hearing. He found that she was "intelligent [and] thoughtful" and likely to be appealing to a prospective employer. He further found that she answered questions precisely, exhibiting a "mental aptitude" likely to lead to her obtaining employment. The ALJ noted that the claimant had "mastered" two languages and that she had a relatively wide range of job experiences making her "well suited" for further employment despite her injury.

The ALJ also entered factual findings concerning the course of the claimant's medical treatment and the physical restrictions imposed by her authorized treating physician, Dr. Hawke, who first treated the claimant on May 4, 2006. He interpreted the claimant's nerve conduction studies as showing a moderate median neuropathy at the right wrist, a mild median neuropathy at the left wrist, and no other abnormalities. He imposed restrictions precluding repetitive activity, On June 16, 2006, Dr. Hawke's colleague, Dr. Fanning, imposed restrictions requiring the claimant to avoid repetitive grasping or gripping, and to avoid lifting over ten pounds, along with restrictions on carrying, pushing and pulling. The claimant decided that she would not undergo surgery, despite several recommendations that she do so. The ALJ also entered factual findings concerning two functional capacity evaluations undergone by the claimant. Dr. Hawke reviewed a functional capacity evaluation report prepared by a therapist at the request of the claimant, Gail Gerig. Dr. Hawke disagreed with the conclusions of that report. He also reviewed a report prepared by HealthSouth, which reported that the claimant could work in positions falling within the sedentary category. The ALJ also found that when the claimant cancelled a scheduled surgery Dr. Hawke determined that she was at maximum medical improvement and he assessed her impairment at five percent of the right arm and three percent of the left. He imposed physical restrictions limiting lifting, carrying, pushing and pulling to ten pounds and limiting repetitive activities to an occasional basis. Dr. Hawke also noted that the claimant should "rotate" to non-repetitive tasks for 40 minutes after every 20 minutes of repetitive activity. The ALJ found that these restrictions were those applicable to the claimant, but that the restrictions set forth in the HealthSouth report were "consistent" with those imposed by Dr. Hawke. As noted, a DIME was performed, which reported that some of the claimant's symptoms were "rather diffuse, nonspecific, and non-physiologic," from which the ALJ inferred that the claimant's "self-imposed restrictions do not support Claimant's inability to earn wages in the job market on as (sic) reasonably sustainable basis." Full Findings of Fact, Conclusions of Law, and Order at 9, ¶ 38 (hereinafter "Order").

The ALJ also entered extensive factual findings regarding the competing evidence and testimony from the parties' respective vocational rehabilitation experts. The ALJ set forth in considerable detail those opinions and explained in similar detail his reasons for crediting the opinions of the respondents' expert over those of the claimant. Having thus weighed the expert evidence, the ALJ concluded that the claimant failed to carry her burden of proving that she was permanently and totally disabled. The ALJ therefore denied those benefits. (The ALJ also awarded permanent partial disability benefits consistent with the respondents' final admission of liability admitting for the scheduled impairment reported by the DIME. However, we do not understand the claimant to have appealed any aspect of that award of permanent partial disability benefits.)

The claimant appealed the ALJ's denial of permanent total disability benefits and presents several arguments. First, the claimant argues that the ALJ erred in denying permanent total disability benefits based at least in part upon the respondents' affirmative defense of an unreasonable refusal of medical treatment, where the defense was neither pleaded nor proved, and which, in addition, constituted an impermissible challenge to maximum medical improvement. The claimant also argues that the ALJ erred in ruling that HealthSouth's report of the functional capacity evaluation was irrelevant and then relying upon it in denying permanent total disability benefits. Finally, the claimant argues that the ALJ abused his discretion in denying permanent total disability benefits. We are unpersuaded that the ALJ committed error requiring reversal of his order.

I.

The claimant argues that the respondents did not endorse the issue of the claimant's unreasonable refusal of surgery until they raised that issue in their post-hearing position statement, and that additionally no questions were put to any witness at the hearing concerning that issue. The claimant further notes that the denial of benefits based upon a refusal of medical treatment, provided for in § 8-43-404(3), C.R.S. 2007, constitutes an affirmative defense that must be pleaded and proved, and that the ALJ erred insofar as he stated otherwise:

While conceding the correctness of these assertions, we nonetheless perceive no reversible error in this respect. Section 8-43-404(3) provides that "[i]f any employee . . . refuses to submit to such medical or surgical treatment . . . as is reasonably essential to promote recovery, the director shall have the discretion to reduce or suspend the compensation of any such injured employee." We agree that this provision sets out an affirmative defense and, as such, it must be pleaded and proved or the defense is waived. *See Valley Tree Service v. Jiminez,* 787 P.2d 658 (Colo.

App. 1990); *Crist v. Booth Land & Livestock,* W.C. No. 4-357-502 (April 9, 1999).

We assume, without deciding, that the ALJ erred in concluding that the claimant's unreasonable refusal to undergo surgery "serves to bar a claim for permanent total disability benefits." Order at 17, ¶ e. However, it is unnecessary for us to determine whether that conclusion constituted error since, in any event, it would be harmless. It is patently evident from the ALJ's order that regardless of the claimant's refusal to undergo surgery, the ALJ weighed the extensive expert vocational rehabilitation and medical evidence and concluded from that evidence that the claimant was not permanently and totally disabled in her present state. Indeed, directly following the ALJ's statement that the claimant's claim for permanent total disability benefits was "barred" by her failure to undergo surgery, he referred to the opinions of Dr. Hawke, Dr. Fremling, and the DIME physician, Dr. Shih, and to his having concluded that the medical evidence did not support the claim of total disability. The ALJ then referred to his having "critically weighed" the competing vocational rehabilitation evidence and again to his having concluded that the more persuasive of that evidence supported a denial of the claim for permanent total disability benefits. Order at 17, ¶ e. Moreover, the ALJ correctly described the legal standard applicable to a determination of the issue of permanent total disability, noting that the proper analysis requires consideration of the various "human factors" applicable to the claimant's ability to earn wages. Finally, as previously noted, the ALJ entered extensive factual findings regarding the conflicting vocational rehabilitation testimony and evidence, and explained in detail his resolutions of those conflicts. Had the ALJ intended merely to dismiss or deny the claim for permanent total disability benefits based upon § 8-43-404(3) (which the ALJ did not cite or mention) his extensive factual findings, his evaluation of the probative value of the conflicting evidence, and his application of the correct legal standard would all have been mere excess unnecessary to his resolution of the disputed issue of permanent total disability. In our view such a reading of the ALJ's order would not be reasonable. Consequently, any error regarding the legal effect of the claimant's failure to undergo surgery was necessarily harmless.

It follows from this that it is unnecessary for us to address the claimant's arguments that the record contains no evidence supporting the finding that the claimant unreasonably refused to have surgery, and that in any event the issue was an impermissible challenge to maximum medical improvement. Any error in either regard would also necessarily be harmless and therefore would be disregarded.

II.

The claimant also argues that the ALJ's order compels the conclusion that she is permanently and totally disabled. The claimant argues that the ALJ's finding that the surgery would have rendered the claimant capable of earning wages necessarily implies that she presently is *not* capable of doing so. Therefore, the claimant argues that permanent total disability benefits should be awarded as a matter of law. We disagree.

In our view it is not a fair reading of the ALJ's order to infer that he "implicitly" concluded that the claimant is unable to earn wages because she did not consent to the recommended surgery. Rather, the ALJ clearly concluded that she was presently able to earn wages and in doing so he properly applied the relevant law. In our view, having correctly applied the legal standards, this issue on review is whether substantial evidence supports the ALJ's factual findings, and we conclude that it does.

Section 8-40-201(16.5)(a), C.R.S. 2007, defines permanent total disability as the claimant's inability "to earn any wages in the same or other employment." The burden of proof to establish permanent total disability is on the claimant. The ALJ properly recognized that in determining whether the claimant has sustained her burden of proof, the ALJ may consider those "human factors" that define the claimant as an individual. *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997). These factors may include the claimant's physical condition, mental ability, age, employment history, education and the "availability of work" the claimant can perform. *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). The overall objective of this standard is to determine whether, in view of all of these factors, employment is "reasonably available to the claimant under his or her particular circumstances." *Weld County School District RE-12 v. Bymer*, 955 P.2d at 558.

Because the issue of permanent total disability is generally factual, we must uphold the ALJ's findings if supported by substantial evidence in the record. § 8-43-301(8), C.R.S. 2007. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). This standard of review requires that we consider the evidence in the light most favorable to the prevailing party, and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). The existence of evidence which, if credited, might support a determination contrary to that reached by the ALJ does not afford us grounds to grant appellate relief *Colorado Fuel and Iron Corp. v. Industrial Commission*, 152 Colo. 25, 380 P.2d. 28 (1963).

Further, the ALJ's assessment of the probative value of the evidence and his credibility determinations are matters solely within his province. We may not set aside a credibility determination unless the testimony of a particular witness, although direct and unequivocal, is "so overwhelmingly rebutted by hard, certain evidence directly contrary" that a fact finder would err as a matter of law in believing the witness. *Halliburton Services v. Miller,* 720 P.2d 571 (Colo. 1986); *Johnson v. Industrial Claim Appeals Office,* 973 P.2d 624 (Colo. App. 1997). Consequently, the ALJ's credibility determinations are binding except in extreme circumstances. *Arenas v. Industrial Claim Appeals Office,* 8 P.3d. 558 (Colo. App. 2001). We will neither reweigh the evidence nor substitute our judgment for that of the ALJ regarding the credibility of the competing witnesses.

We disagree with the claimant's argument that here reasonable minds could draw but a single inference from the factual record. If that were the case, of course, then the question of the claimant's entitlement to permanent total disability benefits would be converted to one of law. *See Schreiber v. Brown & Root, Inc.,* 888 P.2d 274 (Colo. 1993) (a factual issue may become one of law only if reasonable minds can draw but one conclusion from undisputed facts). Contrary to the claimant's argument, however, there is ample evidence in this record supporting the ALJ's findings. The testimony and reports of the respondents' vocational rehabilitation expert constitutes substantial evidence supporting the conclusion that the claimant is capable of employment and therefore is able to earn wages.

III.

The claimant also argues that the ALJ committed error in sustaining the respondents' objection to a question regarding the HealthSouth functional capacity evaluation. The claimant's attorney asked the claimant whether she attempted to return to Dr. Hawke following the functional capacity evaluation performed by HealthSouth. She replied that she "tried to go back to him," and at that point the respondents interposed an objection based upon the relevance of the inquiry. The claimant's attorney responded that the questioning "goes to the weight of the FCE." Tr. at 38. The ALJ sustained the objection, noting that Dr. Hawke had "assigned permanent restrictions" and that whether the claimant was permitted to return to him was not relevant. Tr. at 39. The claimant notes that the ALJ relied upon the HealthSouth functional capacity evaluation report in denying the claimant's claim for permanent total disability benefits. She now argues that by precluding the inquiry into whether she was permitted to return to Dr. Hawke the ALJ erred because such questioning "went to the weight of the report" and presumably would have undermined the credibility of the HealthSouth functional capacity evaluation. We are not persuaded that the ALJ committed reversible error.

The ALJ exercises "wide discretion" in conducting evidentiary proceedings, including making evidentiary rulings. *See* § 8-43-207(1), C.R.S. 2007 (detailing ALJ's authority to conduct evidentiary hearings); *see* *also IPMC Transp. V. Industrial Claim Appeals Office,* 753 P.2d 803, 804 (Colo. App. 1988) (construing predecessor statute to § 8-43-207 to provide hearing officer with wide discretion in conduct of evidentiary proceedings). Similarly, the ALJ is afforded wide discretion to determine whether evidence is relevant, and if so, whether it should be excluded under CRE 403. *See Cherry Creek School District v. Voelker,* 859 P.2d 805 (Colo. 1993); *People v. Gutierrez,* I P.3d 241 (Colo. App. 1999) (trial court's discretion to determine relevancy is broad). We therefore defer to the ALJ's evidentiary determinations unless his ruling constitutes an abuse of discretion by "exceeding the bounds of reason." *See, e.g., Rosenberg v. Board of Educ.,* 710 P.2d 1095, 1098-99 (Colo. 1985) (upholding administrative hearing officer's refusal to allow depositions based on abuse of discretion standard).

Here, in our view the claimant overstates the case by characterizing the ALJ's ruling as one concluding that "testimony regarding the HealthSouth FCE was not relevant." Claimant's Brief in Support of Petition to Review at 13. As we read the transcript the ALJ's ruling was not that broad. Rather, the ALJ merely sustained an objection to the question of claimant's counsel whether a return trip to Dr. Hawke was authorized after the HealthSouth functional capacity evaluation was performed. We do not understand the ALJ's evidentiary ruling as precluding other questions regarding the HealthSouth report, or as determining that the whole of that functional capacity evaluation was "irrelevant." The

ALJ's determination precluding the attorney's inquiry into whether the claimant was permitted to return to Dr. Hawke was not an abuse of the ALJ's discretion. The ALJ apparently concluded that it was only of limited relevance that the respondents were unwilling to pay Dr. Hawke to examine the claimant and presumably to comment upon the HealthSouth report. The attorney's proffered evidence might arguably have permitted the inference that the respondents believed that Dr. Hawke's comments would be detrimental to the respondents' case. However, the ALJ's determination that that evidence was only of limited relevance does not "exceed the bounds of reason." Under these circumstances we cannot conclude that the ALJ abused his discretion in precluding the claimant's attorney from inquiring into whether the respondents were willing to authorize a visit to Dr. Hawke.

Finally, in our view, the ALJ did not rely upon the HealthSouth functional capacity evaluation report as the basis for any dispositive factual finding. In this regard, the ALJ entered somewhat sparse factual findings regarding the conclusions of the report, Order at 6, ¶ 21, and then merely found that the HealthSouth report was "consistent" with Dr. Hawke's restrictions and "confirmed" them. Order at 7, 9, ¶ 25, ¶ 40. As we read the ALJ's order, he relied principally upon Dr. Hawke's restrictions in concluding that the claimant was not permanently and totally disabled. Under these circumstances, any error in precluding the claimant from testifying that a return visit to Dr. Hawke was not authorized was harmless error. As such, it cannot form the basis for relief on appeal. CRE 103(a) (error may not be predicated on evidentiary error unless a substantial right of the party is affected).

IV.

We have considered the claimant's final argument that the ALJ abused his discretion in denying permanent total disability benefits and we are not persuaded to reach a different result. As we understand the claimant's argument it is that the reports, testimony, and opinions of the respondents' vocational rehabilitation expert are so fundamentally flawed as to render them unbelievable as a matter of law. This argument is without merit.

As previously noted, under the applicable standard of review it is the ALJ's sole prerogative to evaluate the credibility of the witnesses and the probative value of the evidence. In this regard, it is for the ALJ to determine the weight and credibility of expert medical opinion, and we may not reweigh the evidence based upon the claimant's argument that the respondents' expert testimony was not credible. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990). We may not substitute our judgment for that of the ALJ regarding credibility matters unless there is such hard, certain evidence contradicting the ALJ's determination that it would be error as a matter of law. *See Halliburton Services* *v. Miller,* 720 P.2d 571 (Cob. 1986). Contrary to the claimant's argument, we do not construe the record here as admitting only of the single result sought by the claimant. The claimant's argument is tantamount to one that she is permanently and totally disabled as a matter of law and that no assessment of the evidence could result in any other conclusion. In our view the ALJ properly weighed the competing evidence and evaluated its probative value prior to drawing reasonable inferences from the record. His decision to credit portions of the testimony of the respondents' expert was reasonable in light of the record and he did not abuse his discretion in that regard. In pointing out possible inconsistencies, weaknesses, or internal conflicts in the expert's testimony, the claimant ignores the point that when determining the credibility of a witness, the ALJ is free to credit all, part, or none of the testimony. *Monfort, Inc. v. Rangel,* 867 P.2d 122 (Colo. App. 1993). We perceive no reversible error in the All's order and therefore affirm.

IT IS THEREFORE ORDERED that the ALJ's order dated November 6, 2007, is affirmed.

INDUSTRIAL CLAIM APPEALS
PANEL

/s/ [Illegible]
Curt Krikseiun

/s/ [Illegible]
Thomas Schrant

NOTICE

This Order is final unless an action to modify or vacate this Order is commenced in the Colorado Court of Appeals, 2 East 14th Avenue, Denver, CO 80203, by filing a petition for review with the Court, within twenty (20) days after the date this Order is mailed, pursuant to § 8-43-301(10) and § 8-43-307, C.R.S. 2007. The appealing party must serve a copy of the petition upon all other parties, including the Industrial Claim Appeals Office, which may be served by mail at 633 17th Street, Suite 600, Denver CO 80202.

[Certificate Of Mailing Omitted In Printing]

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-685-483

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

ROSARIO AVIADO,

Claimant,

v.

ENISICON CORPORATION.

Employer,

and

WAUSAU INSURANCE COMPANIES,

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Fetter, Jr., Administrative Law Judge (ALJ), on June 12, 2007 and completed on August 20, 2007, in Denver, Colorado. The hearing was digitally recorded (reference:6/12/07, Courtroom 1, beginning at 8:35 AM, and ending at 11:59 AM; and, 8/20/07, Courtroom 3, beginning at 8:31 AM, and ending at 8:40 AM).

Claimant was present in person and represented by Chris Forsyth, Esq. Respondents were represented by Scott M. Busser, Esq.

Hereinafter Rosario Aviado shall be referred to as the "Claimant." Ensicon Corporation shall be referred to as the "Employer." All other parties shall be referred to by name.

The August 20, 2007 completion hearing was vacated because Respondents' expert vocational witness, Meg Turner-Elder, had a family emergency. Consequently, the parties agreed to submit Ms. Elder's testimony and any rebuttal thereto by evidentiary deposition. The ALJ ordered Ms. Turner-Elder's deposition to be submitted within 30-days; and, any rebuttal depositions to be submitted within 20-days thereafter. The ALJ further ordered that Claimant's opening brief be submitted, electronically, within 5-days after the filing of the last evidentiary deposition; Respondents' answer brief to be submitted, electronically, within 5-days after the opening brief; and, Claimant's reply brief to be submitted, electronically, within 3-days of the answer brief. Ms. Turner-Elder's evidentiary deposition was filed on September 19, 2007; and, the Claimant's rebuttal evidentiary deposition was filed an October 9, 2007. Claimant's opening brief was filed on October 22, 2007; Respondents' answer brief was filed on November 1, 2007; and, Claimant's reply brief was filed on November 6, 2007. The matter was deemed submitted for decision on November 6, 2007.

ISSUES

The issues to be determined by this decision concern whether or not the Claimant is permanently and totally disabled (PTD); or, in the alternative, if the Claimant is not PTD, is the situs of her functional impairment in the trunk of her body as opposed to her left (LUE) and right (RUE) upper extremities, thus, entitling her to a whole person permanent partial disability (PPD) award instead of scheduled awards for both upper extremities. The Claimant has the burden of proof, by a preponderance of the evidence, on both issues.

PROCEDURAL HISTORY

Claimant sustained an admitted bilateral carpal tunnel syndrome that manifested itself on or about April 24, 2006. Respondents first filed a Final Admission for 5% and 3% scheduled permanent impairment for the right and left upper extremities (RUE and LUE), respectively, on August 18, 2006. Claimant filed a timely objection and initiated the Division sponsored independent medical examination (DIME) process, seeking additional impairment for the neck.

Franklin Shih, M.D., performed the DIME and issued a report dated November 28, 2006. He agreed with the maximum medical improvement date (MMI) found by Jeffrey Hawke, M.D., Claimant's authorized treating physician (ATP), of July 31, 2006. Dr. Shih also agreed with Dr. Hawke's bilateral extremity ratings, although he rated the RUE and LUE as sustaining 7% and 4% scheduled impairment respectively. Dr. Shih found no permanent impairment beyond these extremities.

Respondents accepted the DIME report and filed a conforming Final Admission of Liability, dated December 29, 2006. Thereafter, Claimant filed a hearing application, dated January 26, 2007, on the issues of medical benefits (authorization: reasonably necessary), disfigurement, temporary total disability (TTD) benefits from July 30, 2006 onward, permanent partial disability (PPD) benefits, situs of functional impairment, overcoming the DIME as to MMI, and permanent total disability (PTD). Respondents filed a time response that endorsed those issues as well as statutory offsets.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

General Findings

1. Claimant is a 40-year-old woman who began work for the Employer in 2005. She was working as an assembler for the Employer when she suffered an admitted work injury on April 24, 2006. She was diagnosed with bilateral carpal tunnel syndrome.

2. According to the Claimant she continued working with pain until she was laid off from her position with the Employer on April 28, 2006, four

days after the work injury, for reasons neither the Claimant nor the Employer clearly explained.

3. Claimant was born in the Philippines and learned English as part of her regular studies. After arriving in the United States on October 3, 1992, she worked at a fast food court in the Tabor Center as kitchen help, server and cashier. She also began working at 7-11 effective February 2, 1993. She worked continuously for 7-11 until July 30, 2006 alternating between full and part time employment. She "did everything" at 7-11 including cleaning, ordering, stocking and cashiering. The ordering was initially done by phone and, later, by computer. At the hearing, the ALJ observed that Claimant presented as fluent in English.

4. After leaving the Tabor Center food court, Claimant worked as a fling clerk placed through a temporary agency and learned how to operate Microsoft Excel. Later, she participated in a Family Dollar store. She processed payroll, government forms, and handled negotiations with the landlord. Despite her efforts, the business failed a year later.

5. Claimant then went to work for the Employer herein on August 28, 2005 and continued until April 28, 2006, assembling pumps. She has not worked since leaving that job and her concurrent employment at 7-11, which she left on July 30, 2006.

6. Today, Claimant still performs light housework and can drive for up to thirty minutes before experiencing some numbness.

7. At the hearing, Claimant presented as an intelligent, thoughtful person, the type of person likely to appeal to a prospective employer. During the course of the hearing, she answered questions about prior employment and inclusive dates of employment with a high degree of precision, causing the ALJ to infer and find that she has a mental aptitude likely to assist her in finding employment. She has mastered two languages (English and Tagalog), a skill that many workers do not have. She has worked in a number of jobs, including a family business. While that business ultimately failed, she has a range of experiences that leave her well suited for employment. While she did not have a formal education in the United States, she did complete her education in the Philippines and has learned from the jobs held in this country. Claimant suffered an injury that affected her ability to perform certain jobs, not all jobs, and as found below it is more likely than not that she can perform several jobs in the sedentary category.

THE ATP

8. Dr. Hawke first treated Claimant on May 4, 2006. He ordered nerve conduction studies which displayed delayed D2-wrist/palm-wrist sensory, borderline distal motor delay on the right with a similar left reading as normal, but an abnormal D4-wrist differential. Otherwise, the needle EMG studies were read as normal. The studies were interpreted to show a moderate median neuropathy at the right wrist, a

mild median neuropathy at the left wrist, and no other abnormalities found. Dr. Hawke imposed work restrictions of avoiding repetitive activities and to take a break of 15 minutes per hour.

9. In his initial evaluation report of that same date, Dr. Hawke took a history of symptoms that were limited to the wrists and arms with Claimant's health being otherwise good. Dr. Hawke diagnosed bilateral carpal tunnel syndrome (CTS), right Dr. Quervain's, and bilateral elbow pain/strain. He prescribed medication and splinting. He also discussed the possibility of surgery, which caused Claimant to become "somewhat emotional" as she wanted to "avoid [surgery] at all costs."

10. Dr. Hawke saw Claimant again on May 19, 2006, and re-imposed the restriction against repetitive-activity with either hand. He modified the 15-minute break restriction to allow for non-repetitive duties with her hands during that break. In the subjective portion of his May 19, 2006 interim summary, Dr. Hawke took a history of symptoms extending to, but not beyond, the elbow level.

11. The July 31, 2006, report of Dr. Hawke states as follows:

> Today the patient reports that she has pain in the The ulnar eminence of both hands which is sharp, 8-9/10 on the zero to 10 scale where 10 is the worst pain imaginable. She has numbness and tingling into bath palms and the tips of all 5 digits. She does not

> think she can lift more than 10 pounds. When she scans 12-packs of soda or a gallon of milk while working her other job at Seven Eleven she has to slide it because she cannot lift. She does not do mopping or cleaning. She cannot do repetitive gripping or grasping with either hand. After 20 minutes of repetitive hand use, she has to do her exercises. She has not been doing repetitive work, and does not believe she could do so even for only a third of the time. . . .

The ALJ finds that this history the Claimant gave Dr. Hawke does not constitute an opinion of Dr. Hawke. Indeed, she gave Dr. Hawke a history of continuing to work at 7-11 from April 24, 2006 through July 31, 2006, without doing "repetitive" motion for more than 20 minutes. Claimant chose to leave the 7-11 job. There is no persuasive evidence that she could **not** continue there without doing repetitive work for more than 20 minutes on an indefinite basis. There is no persuasive evidence that the job at 7-11 was not within Claimant's medical restrictions.

12. Dr. Hawke's colleague, Monica Fanning, M.D., saw Claimant on June 16, 2006, modifying the restrictions to avoidance of repetitive grasping or gripping with ten pound lifting, carrying, repetitive lifting, pushing and pulling limits. In the interim summary of that date, Claimant reported that her left hand was "doing fine" without symptoms beyond the hand. Again, the subject of surgery was explained to her and she declined. Drs. Hawke and Fanning

planned to close her case if she declined surgery as they had no further non-surgical options to offer.

13. When Claimant visited Dr. Hawke on June 28, 2006, she reported her pain level as "isn't much now" with a feeling of weakness.

14. The June 16th restrictions were repeated on July 10, 2006. In the interim summary of that same date, Dr. Hawke stated that Claimant was awaiting surgery.

15. Claimant returned to Dr. Hawke on July 31, 2006. She decided not to proceed with surgery despite the recommendations of several treating physicians. Subjectively, Claimant reported increased pain in both hands. She stated she could not lift more than ten pounds. She rejected surgery because she felt that she couldn't take time off for it and could not accept a 5-20% chance of recurrence after surgery. Claimant was still working her second job at 7-11 and described it as not being repetitive. Claimant took Tylenol or Advil as she was not 'comfortable" with prescription medication.

16. Dr. Hawke found no impairment beyond the wrists. He gave Claimant upper extremity impairment ratings based upon lost wrist range of motion. He then converted the ratings to whole person, as mandated by the *A.M.A. Guides to the Evaluation of Permanent Impairment*, 3rd Ed., Rev. Dr. Hawke found impairment only to the hands and wrists as the result of bilateral CTS. He found no impairment to a part of the body beyond the extremities covered by

the schedule. In this regard, his opinion is supported by multiple nerve conduction studies that showed no abnormalities beyond the wrists.

17. Dr. Hawke addressed permanent activity restrictions of limiting lifting, carrying, pushing and pulling to ten pounds. "For every 20 minutes of repetitive tasks", she was to rotate to non-repetitive tasks for 40 minutes and perform stretching exercises for 5-10 minutes. Dr. Hawke did not further articulate what he meant by "repetitive tasks". He recommended no additional medical care.

18. Claimant returned to Dr. Hawke on January 26, 2007. Subjectively, she reported decreased pain in her hands. The only "repetitive" task she described performing was chopping vegetables for her family. Claimant reported no symptoms beyond her hands.

19. Claimant saw Dr. Hawke again on February 16, 2007. She reported waxing and waning pain in both hands, but no other symptoms. Dr. Hawke did not change Claimant's restrictions, impairment rating, or MMI date.

20. At the request of Claimant's counsel, Dr. Hawke reviewed a functional capacity evaluation (FCE) report prepared by a therapist retained by Claimant, Gail Gerig. In a letter dated April 14, 2007, Dr. Hawke disagreed with those FCE findings, noting that limitations on crouching, stooping or neck flexion did not pertain to Claimant's injury.

21. Claimant performed a Functional Capacities Evaluation (FCE) at HealthSouth on June 4, 2007, and a maximum voluntary effort (MVE) protocol was administered. The results demonstrated only 4 of 10 coefficients within the 15% variable limits, reflecting sub maximal effort. In contrast, Claimant's performance on the rapid exchange grip demonstrated maximal effort. The remaining validity tests were inconsistent. The majority of the lifting tests were discontinued as a result of Claimant's failure to cooperate with the testing as opposed to an inability to perform the tests.

22. Although Dr. Hawke imposed the above described restrictions on Claimant's upper extremity use, the Functional Range of Motion (F.R.O.M) tests involved repeated upper extremity reaching from various positions and Claimant registered Methods Time Measurement (MTM) scores of between 87% and 110% ranked her between competitive and above competitive.

23. The evaluators at HealthSouth placed Claimant in the sedentary work category, concluding:

> The results of this evaluation indicate that [Claimant] demonstrated the ability to lift in the SEDENTARY category up to 10 pounds according to the U.S. Department of Labor for an eight hour day, based on her maximum occasional lifts. [Claimant] terminated all lifts secondary to reported pain in her back and hands or stating that she had reached her maximum safe limit. She

> demonstrated the ability to type on an occasional basis with all other positional tolerances performed on a frequent to constant bests . . . [Claimant] was consistent on 9 of 23 consistency tests which may be an indicator of sub maximal effort . . .

Subjectively, Claimant described an average day of driving her daughter to school, shopping, running errands, cooking, and exercising several times a week on a treadmill or stationary bike. While using the stationary bike, she would grip the handles and swing her arms back and forth.

24. At the request of Claimant's counsel, Dr. Hawke reviewed a FCE report prepared by a therapist retained by Claimant, Gail Gerig. In a letter dated April 14, 2007, Dr. Hawke disagreed with those FCE findings, noting that limitations on crouching, stooping or neck flexion did not pertain to Claimant's injury.

25. Dr. Hawke gave Claimant a 10 pound lifting, carrying, pushing and pulling restriction. The HealthSouth FCE confirmed this restriction. Dr. Hawke also imposed a restriction against repetitive upper extremity use for more than 20 minutes an hour. Dr. Hawke did not clarify what he meant by "repetitive". As described below, that restriction does, to some degree, limit Claimant's access to the open labor market. Overall, Dr. Hawke's opinions, particularly the rejection of Gail Gerig's FCE, do not support the proposition that Claimant, more likely than not, is permanently and totally disabled.

26. Mitchell Fremling, M.D., a specialist, saw Claimant on referral from Dr. Hawke's associate, Dr. Fanning. In a note dated June 5, 2006, Dr. Fremling diagnosed bilateral CTS (carpal tunnel syndrome) with failed conservative management. Dr. Fremling offered operative treatment that Claimant refused. He noted that conservative treatment had failed and he offered operative treatment of the CTS. Claimant was very anxious about any operative intervention.

27. Claimant returned to Dr. Fremling on June 29, 2006. Contrary to her reports to Dr. Hawke a day earlier, Claimant reported significant pain and numbness. Surgery was discussed and she agreed to proceed with a right carpal tunnel release. On that date, Dr. Fremling noted that Claimant still had significant pain and numbness in her hands. He noted Claimant was afraid of operations, but she agreed to proceed to a carpal tunnel release, after a lengthy discussion.

28. Dr. Hawke recommended surgery and was of the opinion that surgery would likely have led to further improvement in her condition. Dr. Fremling recommended a right CTS release to improve Claimant's condition. Indeed, Claimant was scheduled for such surgery. Instead, she decided to reject the surgery despite reporting to Dr. Manuele that she would only have a 5-20% chance that her symptoms could recur. The flipside of her remark is that she had been advised that she had an 80-95% chance that the surgery would be successful without a recurrence of the condition.

29. On July 10, 2006, Claimant saw Dr. Hawke who noted Claimant was waiting for her surgery to be scheduled. Dr. Hawke noted that Claimant remained restricted from lifting, carrying, pushing or pulling over 10 pounds. He also noted Claimant should avoid repetitive gripping or grasping with either hand.

30. Surgery was scheduled for August 1, 2006, at North Suburban Surgery Center.

31. Claimant had been working a different job at 7-11. Claimant worked at 7-11 one day a week. Claimant testified, however, that she could no longer do the work in the position due to the pain and work restrictions from her work injury. Claimant stated that she had to leave the one-day-a-week position in July 2006 due to her work injury.

32. On July 31, 2006, Dr. Hawke noted that Claimant had cancelled the surgery. Therefore, Dr. Hawke placed Claimant at MMI. Dr. Hawke provided a 5% RUE impairment rating and 3% LUE impairment rating. Dr. Hawke provided the following work restrictions: "I feel it is reasonable to limit lifting and carrying, pushing and pulling to 10 pounds. Repetitive upper extremity tasks should be limited to an occasional basis. For every 20 minutes of repetitive tasks, she will need to rotate to non-repetitive tasks for 40 minutes and should be allowed to perform stretching exercises for 5-10 minutes." Dr. Hawke has not changed these restrictions and these restrictions remain the permanent work restrictions for the Claimant's admitted work injury.

THE DIME

33. Franklin Shih, M.D., performed a DIME on November 28, 2006. Claimant presented with bilateral upper extremity, upper trunk and low back symptomatology. Dr. Shih questioned Claimant about the low back and upper trunk symptoms and she could only connect them temporally. Otherwise, Claimant's symptoms were limited to her wrists and hands.

34. Despite her low back complaints, Claimant ambulated without pain behavior. She displayed normal cervical range of motion with "diffuse non-specific complaints of tenderness" in the upper trunk. Dr. Shih found functional, active range of motion at the shoulders. Claimant had additional "nonspecific diffuse complaints of tenderness spanning from the shoulder girdle down into the hands including the digits and articulations of the fingers".

35. Dr. Shih assessed Claimant as exhibiting ongoing, nonspecific upper extremity pain complex and mild electro diagnostic abnormalities in both upper extremities. He was of the opinion that her cervical and lumbar complaints were unrelated to the admitted injury. Dr. Shih repeatedly stated that Claimant's complaints were "rather diffuse, non-specific, and non-physiologic" as he struggled to give her an appropriate rating. Dr. Shih agreed with Dr. Hawke's placement of Claimant at MMI.

36. The Claimant made no reference to any functional impairment aside from a singular

reference to the bilateral CTS she sustained in her wrists. There is no persuasive reference to any body part beyond the hands and wrists.

37. Respondent filed a new Final Admission of Liability, dated December 29, 2006, based on Dr. Shih's scheduled ratings.

Medical Evidence Relating to PTD

38. Dr. Fremling expressed no opinion regarding Claimant's capacity to work. Dr. Shih expressed no opinion regarding Claimant's capacity to work. He did have extensive comment on the non-specific, non-physiological nature of Claimant's pain complaints. The ALJ infers and finds that he questioned the legitimacy of Claimant's non-specific complaints. Therefore, the ALJ infers and finds that Claimant's self imposed restrictions do not support Claimant's inability to earn wages in the job market on as reasonably sustainable basis.

39. Dr. Hawke (the ATP) gave Claimant a 10 pound lifting, carrying, pushing and pulling restriction. The HealthSouth FCE confirmed this restriction. This restriction does not support a Claimant's inability to earn wages. It was not cited by Claimant at hearing or her vocational expert as a contributing factor. Dr. Hawke also imposed a restriction against "repetitive" upper extremity use for more than 20 minutes an hour. Dr. Hawke did not clarify what he meant by "repetitive". As described below, that restriction does, to some degree, limit Claimant's

access to the open labor market. Overall, Dr. Hawke's opinions, particularly the rejection of Gail Gerig's FCE, do not support the proposition that Claimant, more likely than not, is unable to earn wages in the job market on a reasonably sustainable basis.

40. The FCE from HealthSouth is consistent with Dr. Hawke's restrictions as to the 10 pound lifting, carrying, pushing and pulling limit. It is also consistent in that Claimant was able to demonstrate the ability to engage in repetitive upper extremity use for periods of less than 20 minutes at a time. Dr. Hawke was of the opinion that Claimant could engage in repetitive upper extremity use for up to 20 minutes. The HealthSouth FCE also found no other credible limitations based on sub maximal effort in other areas. Dr. Hawke, for his part, found no other limitations resulting from the admitted injury. The two are not exclusive and a vocational expert could not err by relying upon both.

VOCATIONAL

Claimant's Vocational Expert

41. According to the Claimant, she now has difficulties even with activities of daily living due to the work injury. She states that she now needs assistance from her family to cook, garden and clean the house. Her daughter now does most of the laundry, folding of clothes, ironing and cleaning the home. Claimant's pain continues. Claimant states that she feels pain in her upper extremities and her

back. Also, she sometimes wakes up at night in pain. The Claimant's activities of daily living, plus the HealthSouth FCE results and her ATP's (Dr. Hawke) opinions about her restrictions contradict, in part, Claimant's testimony concerning her self-imposed limitations.

42. The vocational evidence is in conflict. Anthony Manuele, Edna Claimant's vocational expert, is well credentialed. However, he did not clarify restrictions with any physician, conducted no transferable skills analysis and conducted no labor market studies. Meg Turner-Elder, Respondents' vocational expert, also did not clarify restrictions, but she did conduct a transferable skills analysis and a labor market study. Dr. Manuele did not explain his methodology. Ms. Elder did. Dr. Manuele made the assumption that all of Claimant's prior jobs required repetitive upper extremity use. Ms. Elder did not make such an assumption. In this regard, Dr. Manuele erred as Claimant admitted to Dr. Hawke on July 31, 2006 that the duties of the 7-11 job were not repetitive in nature. In this regard, the ALJ resolves the conflict in the testimony in favor of Ms. Elder because it is based upon more study, research and is more consistent with the aggregate medical and lay evidence.

43. Dr. Manuele tried to emphasize what he perceived to be a lack of formal education on Claimant's part. Ms. Elder noted that Claimant was educated in her country of origin. Elder also noted that Claimant's education also consisted of what she

learned during the course of her employment history. Dr. Manuele ignored any meaningful learning Claimant obtained from her jobs over the years such as learning Microsoft Excel. He also ignored Claimant's personal characteristics such as attention to detail and memory, traits that Elder stated would give her a competitive advantage in the workplace.

44. Dr. Manuele relied on Dr. Hawke's restriction against repetitive upper extremity use. He never sought clarification as to the meaning of "repetitive" nor could he offer a persuasive working definition of that term at hearing. Elder drew upon her prior experience as a return to work coordinator and relied upon an article in a professional publication to arrive at a meaning for the term. Elder's approach was more credible and persuasive than that of Dr. Manuele.

45. Dr. Manuele was of the opinion that the work restrictions provided by Dr. Hawke would prohibit Claimant from returning to any of her previous occupations. Dr. Manuele was also of the opinion that all of the previous occupations require repetitive use of the upper extremities. Dr. Manuele stated that the "theoretical" employment positions proposed by Respondents' expert, Meg Turner-Elder, required repetitive motion that was prohibited by Dr. Hawke's restrictions. Dr. Manuele wrote: "After reviewing all of the factors in [Claimant's] case, it is highly unlikely that she will be able to return to work in any job in the economy at the present time and would not be able to maintain regular and steady employment in a job if she found such a job due to her

restrictions, ongoing pain, and numbness in her hands." For the reasons articulated below, the ALJ does not find Dr. Manuele's opinions persuasive or credible.

46. Dr. Manuele also is of the opinion that Claimant retains the capacity to earn any wages if she would get the previously offered surgery. He is of the opinion that if Claimant underwent the recommended surgery, reviewed her vocational options, researched the labor market and tried to match her skills to the available jobs, she'd be employable.

Respondents' Vocational Expert

47. Meg Turner-Elder relied upon the HealthSouth FCE and the opinion of Dr. Hawke as her assumptions on physical restrictions. In both her report and deposition testimony, she explained how she relied on the medical evidence. It is unclear what Dr. Manuele relied upon in terms of restrictions. Apparently, Dr. Manuele is of the opinion that any upper extremity use is "repetitive," but he does not persuasively explain how he arrived at such an opinion.

48. Elder is a vocational consultant with Cascade Disability Management. She summarized the medical documents available to her. Under the socioeconomic factors of her report, she noted Claimant's statements that Claimant currently enjoys gardening, sewing, biking, and use of a treadmill. Claimant also enjoys organizing and holding garage sales

involving products left over from her family's dollar store.

49. Based on the job history provided by Claimant, Elder categorized the prior work experience as store clerk, stock control clerk, inventory clerk, general clerk, personnel clerk, data entry clerk, cook, fast food worker, food and beverage order clerk, payroll clerk, sorter, administrative clerk, real estate clerk, receptionist, and manager of a retail store. The latter was based on Claimant's experience helping to run a Family Dollar store.

50. Based upon her transferable skills analysis, Elder was of the opinion that Claimant retained access to 500 positions with limitations of sedentary capability. She identified a number of jobs which did not require "repetitive" upper extremity use including:

1. food and beverage order clerk;
2. office manager;
3. school secretary;
4. clerk (benefits, hospital admission, credit, audit, insurance, accounting, etc);
5. crew scheduler;
6. night auditor;
7. dispatcher;
8. retail store manager;

9. customer service representative; and

10. receptionist.

Elder was of the opinion that Claimant retained the aptitudes acquired during her employment history. Ultimately, Elder concluded her report, stating:

> Based on [Claimant's] work history, transferable skills, and in reviewing the restrictions outlined by Dr. Hawke in [sic] both of the results of the FCE's, I have considered all above reports as it relates to assigning work restrictions and I believe that at a minimum, [Claimant] can seek employment in a sedentary work category . . .
>
> [Claimant] indicated to me that she has [sic] works in her own garden, that she cooks, cleans, and every weekend she has a garage sale at her home. These activities indicate that she is currently living her life at least in a sedentary or greater capacity. This indicates to me that she is able to perform work in a competitive environment.
>
> [Claimant] also possesses transferable skills that would allow her to work in other positions that are commonly found and available in the Denver geographic labor market.

51. Elder's methodology includes a review the provided medical records and interviews the subject as to work history, educational background, social background, and any hobbies or skills. This is followed by a transferable skills analysis and labor market research.

52. Elder interviewed the Claimant and the information gleaned from that interview is already contained in great detail in her report. Elder was present at hearing and heard Claimant's testimony. None of Claimant's testimony regarding background and work activities varied from that provided in the interview.

53. Elder reviewed the Gerig FCE, Dr. Hawke's records, and the FCE performed at Health South.

54. Elder used a computer program to input the data obtained from the interview, adjusted for the identified work restrictions, and generated a transferable skills analysis. The restrictions that could have been used were limited to the categories of sedentary, light, medium and heavy. In Claimant's case, Elder used sedentary. Transferable skills are mental or physical in nature as activities have both physical and mental components.

55. Once the transferable skills analysis is completed, Elder then examines whether there are jobs, based on the Dictionary of Occupational Titles (DOT), within the subject's commutable labor market. In Claimant's case, Elder determined that the commutable labor market was within a 20-30 mile radius of Claimant's home, or the Denver metropolitan area.

56. Elder is familiar with the term SVP (specific vocational preparation). It is a scale that measures the experience that someone in a particular job may possess. SVP does not measure an individual's ability

to perform a particular job as it merely measures the amount of time a person has on the job.

57. Claimant's transferable skills include knowing how to order materials, making copies, buying supplies, managing employees (hiring and firing), communicating effectively, and dealing with members of the public. Elder characterized Claimant's communication skills as adequate if not better. Based upon Claimant's ability to recall specific dates of employment, Elder observed that Claimant had good powers of recall and was very detail oriented, both of which were desirable transferable skills. These skills would give Claimant a competitive advantage over other job candidates.

58. Claimant argues that Elder's opinion is based on the idea that an employer will not be busy. When questioned regarding the use of a cash register, Elder testified as follows:

> Q But physically, constantly running a cash register would be repetitive motion by any definition, correct?
>
> A Depends on the lull of the shop that she might be in. She might – I don't know specifically to what –

Claimant argues that the fact that Elder indicated that Claimant could not work a busy lunch hour at McDonald's translates to an inability to earn wages in the job market. To accept this argument would be to equate permanent total disability with any inability to perform some of the busiest and most demanding job duties. This argument is not well taken.

59. According to Elder, Claimant is capable of earning wages within her commutable labor market in at least ten different types of jobs. Within each type, there are at least ten jobs available.

60. Based on Claimant's restrictions, Elder agreed that the weight limitation identified by Claimant, the Health South FCE and Dr. Hawke is consistent. As for repetitive movements, Dr. Hawke did not clarify the term and the DOT does not utilize the term. Instead, the DOT uses the terms "occasional", "frequent", and "continuously". To address the definition of "repetitive", Elder referred to an article, "Ergonomics for Prevention of Musculoskeletal Disorders" which stated that "repetitive" meant 'performing the same motion, a series of motions continually or frequently for an extended period of time". A task is repetitive if "the same thing" is done two thirds to the whole time of an eight-hour day. As an example, writing for ten minutes at a time is not repetitive. Elder interpreted Dr. Hawke's restriction to refer to individual repetitive tasks as distinguished from other tasks that, individually, are not repetitive.

61. The food and beverage order clerk job identified in Elder's report did not require "repetitive" upper extremity use. Likewise, Elder was of the opinion that a cashier's position did not require "repetitive" upper extremity use.

62. Claimant has transferable skills, including communication, that do not require "repetitive" upper extremity use. Elder agreed with Dr. Manuele to the extent that two positions Elder identified for Claimant did not require "repetitive" upper extremity use: the customer complaint clerk and the manager of credit and collection.

63. When asked to review the Health South report and Claimant's description of using an exercise bike, Elder concluded that Claimant demonstrated an ability to engage in "repetitive" upper extremity use for certain periods of time not inconsistent with the identified potential jobs. Ultimately, Elder was of the opinion that Claimant is capable of earning wages in the job market within her commutable labor market.

64. The expert vocational testimony of Meg Turner-Elder was more thorough; based on more study and research; based on more detailed methodology; was more consistent with the aggregate medical records; and, therefore, was more credible and persuasive than the expert testimony of Dr. Anthony Manuele.

65. When the vocational evidence is critically weighed, it does not support a finding that Claimant is incapable of earning any wages.

66. Elder indicated that Claimant's restrictions would require an employer to make a minor, special accommodation. Specifically, Elder testified as follows:

> Q (from Respondent counsel) Okay. So would a requirement that [Claimant] do stretching exercises, during the course of a day, would that constitute a special accommodation that an employer would have to make?
>
> A I believe it would.

The ALJ finds that such a non-specific, minor "accommodation" does not rise to the level of rendering employment "sheltered employment." Indeed, unspecified stretching exercises are more analogous to activities within the sector of "personal comfort," such as bathroom breaks. Moreover, such a proposed "accommodation" is so minor that it would not detract to any significant degree from Claimant's ability to do any of the jobs identified by Elder.

ULTIMATE FINDINGS

67. Claimant has failed to prove, by a preponderance of the evidence that she is incapable of earning wages in the competitive job market on a reasonably sustainable basis.

68. Claimant has failed to prove, by a preponderance of the evidence that the situs of her functional impairment transcends the admitted upper extremities.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility and Burden of Proof

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeal's Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P. 2d 1205 (1936); COLORADO JURY INSTRUCTIONS, CIVIL, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke*, 139 Colo. 305, 338 P. 2d 284 (1959).

As found, the expert vocational testimony of Meg Turner-Elder was more thorough; based on more study and research; based on more detailed methodology; more consistent with the aggregate medical records; and, therefore, more credible and persuasive than the expert testimony of Dr. Anthony Manuele.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the entitlement to additional benefits, beyond those admitted. Sections 8-43-201 and 8-43-210, C.R.S. (2007). *See City of Boulder v. Streeb*, 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office*, 24 P. 3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.*, 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.*, W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has failed to sustain her burden of proof with respect to PPD beyond the scheduled ratings of both upper extremities, admitted by the Respondents. Also, as found, Claimant has failed to meet her burden of proof with respect to PTD.

Additional Permanent Partial Disability

c. Claimant must prove that the situs of functional impairment is not a part of the body contained on the schedule. *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Health Care Systems*, 917 P.2d 366 (Colo. App. 1996); *Yakovich v. Dayton Hudson*, W.C. 4-638-044 [Industrial Claim Appeals Office (ICAO), May 9, 2007]; *Brewer v. General Motors*, W.C. 4-163-770 & 4-264-470 (ICAO, March 31, 1999). In determining the situs of functional impairment, the ALJ should consider the actual impairment rating *Clark v. Kaiser Hill Co.*, W.C. 4-510-204 (ICAO, June 3, 2004). As found, the Claimant has made no reference to any functional impairment aside from a singular reference to the bilateral CTS she sustained in her wrists. There was no persuasive reference to any body part beyond the hands and wrists. As further found, Dr. Shih, the DIME examiner was of the opinion that any cervical spine complaints are unrelated to the admitted injury. As found, Dr. Hawke (the ATP) was of the opinion that there was impairment only to the hands and wrists as the result of bilateral CTS. He found no impairment to a part of the body beyond the schedule. In this regard, his opinion is supported by multiple nerve conduction studies that showed no abnormalities beyond the wrists, Claimant's subjective complaints of back pain are outweighed by the opinions of Drs. Hawke and Shih as well as the objective nerve conduction studies.

Permanent Total Disability

d. An employee is permanently and totally disabled if she is unable to earn any wages in the same or other employment. Section 8-40-201(16.5)(a) C.R.S. (2007). *See Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). In determining whether a claimant is permanently and totally disabled, an ALJ may consider the claimant's "human factors," including the claimant's age, work history, general physical condition, education, and prior training and experience. *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997); *Weld County School District RE-12 v. Byrnes*, 955 P.2d 550 (Colo. 1998); *Joslin's Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). The test for permanent total disability is whether employment exists that is reasonably available to the claimant under her particular circumstances. *Id.* This means whether employment is available in the competitive job market, which a claimant can perform on a reasonably sustainable basis. Another human factor is a claimant's ability to obtain and maintain employment within her physical abilities. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). This is because the ability to earn wages inherently includes consideration of whether a claimant is capable of getting hired and sustaining employment. *See Christie v. Coors Transportation Co., supra*; *Cotton v. Econ. Lube N Tune*, W.C. No. 4-220-395 (ICAO, January 16, 1997), *aff'd, Econ. Lube N*

Tune v. Cotton (Colo. App. No. 97CA0193, July 17, 1997). Consequently, if the evidence shows the claimant would not be physically able to sustain employment, the ALJ need not find the claimant is capable of earning wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office, supra*.

e. As found, Claimant unreasonably declined, which is her right, CTS surgery when the chances of success were approximately 85%. Viewed in that light, her decision to decline the surgery was objectively unreasonable and serves to bar a claim for permanent total disability benefits. *Industrial Commission v. Vigil*, 150 Colo. 356, 373 P.2d 308 (1962); *Cain v. Industrial Commission*, 136 Colo. 227, 315 P.2d 823 (1957); *Seals v. Samsonite Corp.*, W.C. 3-897-180 (ICAO, January 2, 1990); *Fries v. Pueblo County*, W.C. 3-826-911 (ICAO, September 15, 1989). As found, Dr. Hawke recommended surgery and was of the opinion that it would likely have led to further improvement in her condition. Dr. Fremling recommended a right CTS release to improve Claimant's condition. Indeed, Claimant was scheduled for such surgery. Instead, she decided to reject the surgery despite reporting to Dr. Manuele that she would only have a 5-20% chance that her symptoms could recur. The flipside of that remark is that she had been advised that she had an 84-95% chance that the surgery would be successful without a recurrence of the condition. As further found, Dr. Hawke's opinions, particularly the rejection of Gail Gerig's FCE, do not support the proposition that Claimant, more likely than not, cannot work and earn wages. Dr. Fremling expressed no opinion regarding Claimant's capacity to work. Dr. Shih (the DIME) expressed no opinion regarding Claimant's capacity to work. The medical evidence does not support the proposition that Claimant is unable to work and earn wages. As found the conflict between Dr. Manuele's vocational opinions and Meg Turner-Elder's opinions was resolved in favor of Meg Turner-Elder's vocational opinions. When the vocational evidence is critically weighed, it does not support a conclusion that Claimant is permanently and totally disabled within the meaning of the Workers' Compensation Act and the cases hereinabove that further elaborate of the meaning of "permanent total disability."

f. Citing *Crist v. Booth Land & Livestock*, W.C. No. 4-357-507 (ICAO, April 9, 1999), a decision of the Industrial Claim Appeals Office that does not set precedent, Claimant argues that Claimant's refusal to undergo the surgery recommended by Claimant's physicians was an affirmative defense that Respondents had not plead and proven. Claimant proceeds to claim surprise and a violation of Claimant's due process rights by allowing this "affirmative defense" to be "endorsed after the evidentiary hearing." The approach of this argument is disingenuous insofar as it diverts the focus from Claimant's burden of establishing that she is permanently and totally disabled. Indeed, as found, the Claimant cannot unreasonably refuse recommended surgery, which would more than likely render her capable of earning wages, and claim lifetime permanent total disability benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims for permanent total disability benefits are hereby denied and dismissed.

B. Any and all claims for additional permanent partial disability benefits are hereby denied and dismissed and the Final Admission, dated December 29, 2006, is hereby affirmed and adopted as part of this decision.

DATED this 6 day of November 2007.

/s/ Edwin L. Felter
EDWIN L. FELTER JR.
Administrative Law Judge

This decision of the Judge is final, unless a Petition to Review this decision is filed within twenty (20) days from the date this decision is mailed. Section 8-43-301(2), C.R.S. The Petition to Review must be filed with the Office of Administrative Courts, 633 17th St, Suite 1300, Denver, CO 80202. See Rule 26, OACRP, for further information regarding the procedure to be followed when filing a Petition to Review.

[Certificate Of Service Omitted In Printing]

COLORADO COURT OF APPEALS

Court of Appeals No.: 08CA0923
Industrial Claim Appeals Office of the State of Colorado
WC No.: 4685483

Rosario Aviado,

Petitioner,

vs.

Industrial Claim Appeals Office of the
State of Colorado, Ensicon Corporation
and Wausau Insurance Corporation

Respondents.

ORDER OF COURT RE: PENDING MOTIONS

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1. The division denies claimant's motion to disqualify. The fact, if it is one, that the judicial branch has opposed the transfer of Administrative Law Judges into the judiciary is not a basis to conclude that the judges of this court, including the division now assigned to the case, cannot be impartial. The court denies as moot that part of the motion that requests disqualification of Chief Judge Davidson because Judge Davidson is not slated to be a member of the panel deciding this case. The court has no power to act on the motion to the extent it prematurely moves to disqualify Chief Justice Mary Mullarkey of the Colorado

Supreme Court. The court denies and rejects any remaining contentions or requests contained in the motion to disqualify or any supplements thereto.

2. The court grants the request for expanded oral argument. Each party shall have thirty minutes for oral argument.

3. The court denies the request to take judicial notice of briefs filed in the cases cited in the briefs and noted in claimant's motion to supplement the record.

4. The court denies the request to amend the opening brief to include the argument that workers' compensation claimants are a suspect class, requiring a strict scrutiny level of review. The issues are those framed by the Opening Brief, except as set forth below.

5. The court defers a decision on claimant's requests concerning § 8-43-309, C.R.S. 2008, which includes the request for a ruling within thirty days and the motion to vacate findings below and to proceed in district court. The court will include a disposition of these motions in its written opinion that will follow oral arguments. At oral argument, the parties shall address the issues raised in the motion and the response, including whether the statute is jurisdictional or directory. *See DiMarco v. Dep't of Revenue*, 857 P.2d 1349 (Colo. App. 1993); *Burns v. Bd. of Assessment Appeals*, 820 P.2d 1175 (Colo. App. 1991).

BY THE COURT:

Casebolt, J.
Roy, J.
Connelly, J.

February 10, 2009

Copies to: Counsel of Record

COLORADO COURT OF APPEALS

Court of Appeals No.: 08CA0923
Industrial Claim Appeals Office of the State of Colorado
WC No.: 4685483

Rosario Aviado,

Petitioner,

vs.

Industrial Claim Appeals Office of the
State of Colorado, Ensicon Corporation
and Wausau Insurance Corporation

Respondents.

ORDER OF COURT RE: PENDING MOTIONS

Claimant's Motion for Reconsideration and Amendment to Motion for Reconsideration are before the court for ruling. Having considered the motions, the court rules as follows:

1. Claimant asserts the court did not employ the appropriate standard in denying the motion for disqualification. The court disagrees. The statement in the previous order that "The fact, if it is one" was meant to convey that the court accepted that the asserted fact was true. Even assuming that fact to be true, the court perceived and continues to perceive no appearance of impropriety that would require disqualification.

2. Claimant asserts that this court is the trial court for purposes of hearing a constitutional challenge and that we should allow amendments to "pleadings" to raise new issues. We disagree. We sit as an appellate court only. We do not find facts. Claimant could have presented evidence in a declaratory judgment proceeding had she filed one or, alternatively, submitted evidence to the ALJ in the administrative proceeding by an offer of proof.

3. Claimant asserts that this court has neglected its statutory mandate to give worker's compensation cases priority over other cases. The opinion of the court in this case, issued contemporaneously with this order, responds to and addresses the legal effect of claimant's assertion.

4. The court rejects any assertion that a ruling in another case demonstrates some bias against the arguments that claimant has made in this case. The court continues to perceive no reason for disqualification.

BY THE COURT:

Casebolt, J.
Roy, J.
Connelly, J.

April 16, 2009

Copies to: Counsel of Record

Colorado Court of Appeals 2 East 14th Ave., Third Floor Denver, CO 80203	**COPIES MAILED TO COUNSEL OF RECORD** Tr. Ct. Judge Tr. Ct. Clerk AND ________ ON 05/14/09 BY [Illegible]
Industrial Claim Appeals Office WC4685483	
Petitioner: Rosario Aviado, **v.** **Respondents:** Ensicon Corporation, Wausau Insurance Corporation, and Industrial Claim Appeals Office.	Court of Appeals Case Number: 2008CA923
ORDER DENYING PETITION FOR REHEARING	

The **PETITION FOR REHEARING** filed in this appeal by: Rosario Aviado, Petitioner

is **DENIED.**

Issuance of the Mandate is stayed until: June 15, 2009.

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

DATE: MAY 14, 2009

BY THE COURT:

Judge Casebolt
Judge Connelly
Judge Roy

Colorado Supreme Court 2 East 14th Ave., Fourth Floor Denver, CO 80203	
Certiorari to the Colorado Court of Appeals, 2008CA923 Industrial Claim Appeals Office, WC 4-685-483	
Petitioner: Rosario Aviado, **v.** **Respondents:** Industrial Claim Appeals Office of the State of Colorado, Ensicon Corporation, and Wausau Insurance Corporation.	Supreme Court Case No: 2009SC454
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, **DENIED**.

BY THE COURT, EN BANC, APRIL 5, 2010.

[SEAL]

[Certificate Of Service Omitted In Printing]

Colo. Rev. Stat. § 8-1-102. Industrial claim appeals office – creation – powers and duties.

(1) There is hereby created in the office of the executive director of the department of labor and employment the industrial claim appeals office, which may consist of five industrial claim appeals examiners, who shall be appointed to serve on the industrial claim appeals panel by the executive director pursuant to section 13 of article XII of the state constitution and the laws and rules governing the state personnel system. Each industrial claim appeals examiner shall exercise such examiner's powers and perform such examiner's duties and functions in the industrial claim appeals office within the office of the executive director of the department as if transferred thereto by a **type 2** transfer as such transfer is defined in the "Administrative Organization Act of 1968", article 1 of title 24, C.R.S. Decisions and orders of the industrial claim appeals panel may be made by two appeals examiners. In the event of a disagreement between such two appeals examiners, a third appeals examiner shall review the case, and the decision and final order of the appeals panel shall reflect the collective decision of all three appeals examiners.

(2) The industrial claim appeals panel has the duty and the power to conduct administrative appellate review of any order entered pursuant to articles 43 and 74 of this title and to make a decision on said appeal.

Colo. Rev. Stat. § 8-40-102. Legislative declaration.

(1) It is the intent of the general assembly that the "Workers' Compensation Act of Colorado" be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation, recognizing that the workers' compensation system in Colorado is based on a mutual renunciation of common law rights and defenses by employers and employees alike.

(2) The general assembly hereby finds that the determination of whether an individual is an employee for purposes of the "Workers' Compensation Act of Colorado" is subject to a great deal of speculation and litigation. It is the intent of the general assembly to provide an easily ascertainable standard for determining whether an individual is an employee. In order to further this objective, the test for determining whether an individual is an employee for the purposes of the "Workers' Compensation Act of Colorado" shall be based on the nine criteria found in section 8-40-202(2)(b)(II) which shall supersede the common law. The fact that an individual performs services exclusively or primarily for another shall not be conclusive evidence that the individual is an employee.

Colo. Rev. Stat. § 8-43-201. Disputes arising under "Workers' Compensation Act of Colorado".

PART 2 SETTLEMENT AND HEARING PROCEDURES

The director and administrative law judges employed by the office of administrative courts in the department of personnel shall have original jurisdiction to hear and decide all matters arising under articles 40 to 47 of this title; except that the following principles shall apply: A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; and a workers' compensation case shall be decided on its merits.

Colo. Rev. Stat. § 8-43-301. Petitions to review.

(1) Any order, corrected order, or supplemental order is final unless a petition to review or appeal has been filed in accordance with this article.

(2) Any party dissatisfied with an order that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty may file a petition to review with the division, if the order was entered by the director, or at the Denver office of the office of administrative courts in the department of personnel, if the order was entered by an

administrative law judge, and serve the same by mail on all the parties. The petition shall be filed within twenty days after the date of the certificate of mailing of the order, and, unless so filed, the order shall be final. The petition to review may be filed by mail, and shall be deemed filed upon the date of mailing, as determined by the certificate of mailing, if the certificate of mailing indicates that the petition to review was mailed to the division or to the Denver office of the office of administrative courts in the department of personnel, as appropriate. The petition to review shall be in writing and shall set forth in detail the particular errors and objections of the petitioner. A petitioner shall, at the same time, order any transcript relied upon for the petition to review, arrange with the hearing reporter to pay for the same, and notify opposing parties of the transcript ordered. Opposing parties shall have twenty days after the date of the certificate of mailing of the petition to review to order any other transcript not ordered by the petitioner and arrange with the hearing reporter to pay for the same.

(3) If transcripts of hearings are ordered as part of the record in a petition to review, the director or administrative law judge cannot rule on the petition until the transcripts are lodged with the division.

(4) When the record upon which a petition to review has been filed is complete, the parties shall be notified in writing. The petitioner shall have twenty days after the date of the certificate of mailing of the notice to file a brief in support of the petition. The

opposing parties shall have twenty days after the date of the certificate of mailing of the petitioner's brief to file briefs in opposition thereto. After the briefs are filed or the time for filing has run, the director or administrative law judge shall have thirty days to enter a supplemental order or transmit the file to the industrial claim appeals office for review.

(5) In ruling on a petition to review, the director or administrative law judge may issue a supplemental order labeled as such limited to the matters raised in the petition to review, and, as to those matters, the director or administrative law judge may amend or alter the original order or set the matter for further hearing. In any event, if it has not already been done, the administrative law judge or director, following a petition to review an order, shall make findings of fact and conclusions of law necessary to support such order.

(6) A party dissatisfied with a supplemental order may file a petition for review by the panel. The petition shall be filed with the division if the supplemental order was issued by the director, or at the office of the administrative courts in the department of personnel if the supplemental order was issued by an administrative law judge. The petition shall be filed within twenty days after the date of the certificate of mailing of the supplemental order. The petition shall be in writing, shall set forth in detail the particular errors and objections relied upon, and shall be accompanied by a brief in support thereof. The petition and brief shall be mailed by petitioner to all

other parties at the time the petition is filed. All parties, except the petitioner, shall be deemed opposing parties and shall have twenty days after the date of the certificate of mailing of the petition and brief to file with the division or the office of administrative courts, as appropriate, briefs in opposition to the petition.

(7) When any petition for review by the panel is filed, the division or the office of administrative courts shall, when all briefs are submitted to the division or office of administrative courts or within fifteen days after the date briefs were due, certify and transmit the record to the industrial claim appeals office along with the petitions and briefs. The division shall simultaneously send notice to the parties including the date that the record has been transmitted to the industrial claim appeals office.

(8) The industrial claim appeals office shall have sixty days after receipt of the certified record to enter its order. The panel may issue a summary order affirming the order of the administrative law judge or director. The panel may correct, set aside, or remand any order but only upon the following grounds: That the findings of fact are not sufficient to permit appellate review; that conflicts in the evidence are not resolved in the record; that the findings of fact are not supported by the evidence; that the findings of fact do not support the order; or that the award or denial of benefits is not supported by applicable law.

If the findings of fact entered by the director or administrative law judge are supported by substantial evidence, they shall not be altered by the panel.

(9) The panel shall have the power to issue such procedural orders as may be necessary to carry out its appellate review under subsection (7) of this section, including but not limited to, orders concerning completion of the record and filing of briefs. In those cases where the parties file a stipulated motion requesting that consideration of the appeal be deferred pending ongoing settlement negotiations, the panel may extend the time for entry of its order up to a maximum of thirty days.

(10) The panel's order shall be mailed to all parties of record. Any party dissatisfied with the panel's order shall have twenty days after the date of the certificate of mailing of such order to commence an action for judicial review in the court of appeals.

(11) If the panel has failed to enter its order within sixty days of the receipt of the certified record, the order of the director or administrative law judge shall be deemed the order of the panel and final unless, within thirty days after the end of the sixty-day period, the petitioner commences an action for judicial review in the court of appeals. If the panel has not acted on the sixtieth day, the industrial claim appeals office shall send a written notice to all parties stating that the parties have thirty days after the date of the certificate of mailing of the notice to commence such an action.

(12) If a petition to review is filed, a hearing may be held and orders entered on any other issue in the case during the pendency of the petition to review. If the order which is under petition to review concerns compensability, orders entered on these later issues are final and appealable when entered, but not enforceable until the review of the order on compensability is completed.

(13) If the order which is under petition to review does not concern compensability, but concerns the respective liability of two or more employers or insurance carriers, and the injury or illness was found compensable in a hearing held pursuant to section 8-43-215, the employer or insurance carrier found liable by the director or administrative law judge shall pay benefits in accordance with the order under review until the review process is completed, at which time it shall be reimbursed by the other employer or carrier if reimbursement is necessary to comply with the final order.

(14) The signature of an attorney on a petition to review or brief in support thereof constitutes a certificate by the attorney that such attorney has read the petition or brief; that, to the best of the attorney's knowledge, information, or belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, cause delay, or unnecessarily increase the cost of litigation. If a

petition or brief is signed in violation of this subsection (14), the director, the administrative law judge, or the panel shall award reasonable attorney fees and costs to the party incurring the fees and costs as a result of the improper actions.

Colo. Rev. Stat. § 8-43-308. Causes for setting aside award.

Upon hearing the action, the court of appeals may affirm or set aside such order, but only upon the following grounds: That the findings of fact are not sufficient to permit appellate review; that conflicts in the evidence are not resolved in the record; that the findings of fact are not supported by the evidence; that the findings of act do not support the order; or that the award or denial of benefits is not supported by applicable law. If the findings of fact entered by the director or administrative law judge are supported by substantial evidence, they shall not be altered by the court of appeals.

Colo. Rev. Stat. § 8-47-101. Division of workers' compensation – creation – powers, duties, and functions – transfer of functions – change of statutory references.

(1) There is hereby created the division of workers' compensation in the department of labor and employment. Pursuant to section 13 of article XII of the state constitution, the executive director of the

department of labor and employment shall appoint the director of the division of workers' compensation, and the director shall appoint such employees as are necessary to carry out the duties and exercise the powers conferred by law upon the division of workers' compensation and the director.

(2) The director and the division of workers' compensation shall enforce and administer the provisions of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, as provided in said articles and the provisions of article 14.5 of this title.

(3)(a) The division of workers' compensation shall, on and after July 1, 1991, execute, administer, perform, and enforce the rights, powers, duties, functions, and obligations vested in the division of labor prior to July 1, 1991, concerning the duties and functions transferred to the division of workers' compensation. On July 1, 1991, all employees of the division of labor whose principal duties are concerned with the duties and functions transferred to the division of workers' compensation and whose employment in the division of workers' compensation is deemed necessary by the executive director of the department of labor and employment to carry out the purposes of this article shall be transferred to the division of workers' compensation and shall become employees thereof. Such employees shall retain all rights to the state personnel system and retirement benefits under the laws of this state, and their services shall be deemed to have been continuous. All transfers and any abolishment of positions in the state personnel system shall be made and processed in accordance with state personnel system laws and rules and regulations.

(b) Repealed.

(c) Whenever the division of labor is referred to or designated by any contract or other document in connection with the duties and functions transferred to the division of workers' compensation, such reference or designation shall be deemed to apply to the division of workers' compensation. All contracts entered into by the said division of labor prior to July 1, 1991, in connection with the duties and functions transferred to the division of workers' compensation are hereby validated, with the division of workers' compensation succeeding to all the rights and obligations of such contracts. Any appropriations of funds from prior fiscal years open to satisfy obligations incurred under such contracts are hereby transferred and appropriated to the division of workers' compensation for the payment of such obligations.

(d)(I) Repealed.

(II) Commencing in the 1992 legislative session and at least every four years thereafter, the general assembly shall provide for the conduct of a performance review by the state auditor of the administrative law judges in the office of administrative courts who hear cases under articles 40 to 47 of this title. The review shall include, but not be limited to, the following topics: The time elapsed from the date of hearing until decisions are rendered by the administrative law judges; the time elapsed from the point at which the file is complete and the case is ready for order until the decision is rendered by the administrative law judges; the number of decisions that are reversed upon appeal to the industrial claim appeals panel and to the court of appeals respectively; the workload or number of cases assigned to each administrative law judge; and the public perception of the quality of the performance of the office of administrative courts with respect to matters arising under the "Workers' Compensation Act of Colorado".

(4) Repealed.

(5) On and after July 1, 1991, when any provision of articles 40 to 47 of this title refers to the division of labor said law shall be construed as referring to the division of workers' compensation.

(6) The revisor of statutes is authorized to change all references to the director of the division of labor, and the division of labor in articles 14.5 and 40 to 47 of this title to refer to the director of the division of workers' compensation and the division of workers' compensation.

Colo. Rev. Stat. § 24-30-1001. Office of administrative courts – administrative courts cash fund – creation.

(1) Effective July 1, 2005, there is hereby created the office of administrative courts in the department of personnel, the head of which shall be the

executive director of the department of personnel. The office of administrative courts shall exercise its powers, duties, and functions as a **type 2** agency.

(2) The executive director at the department of personnel shall establish and maintain administrative offices and courts for the office of administrative courts in Denver, and in the southern region and on the western slope of the state, in addition to such other offices and courts as the executive director deems necessary to carry out the powers, duties, and functions of the office of administrative courts.

(3) The executive director of the department of personnel shall establish any fees or cost allocation billing process necessary to pay for the direct and indirect costs of the office of administrative courts. The department of personnel shall not establish a fee for individuals or beneficiaries that have a right to an administrative hearing without prior approval of the associated state agency and formal rule-making related to the fee pursuant to article 4 of this title. All moneys collected shall be transmitted to the state treasurer, who shall credit the same to the administrative courts cash fund, which fund is hereby created. The moneys in the fund shall be subject to annual appropriation by the general assembly for the direct and indirect costs of the office of administrative courts. All interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of a fiscal year shall

remain in the fund and shall not be credited or transferred to the general fund or any other fund.

Colo. Rev. Stat. § 24-30-1003. Administrative law judges – appointment – qualifications – standards of conduct.

(1) The executive director of the department of personnel may appoint such administrative law judges except those employed pursuant to sections 24-50-103(7) and 40-2-104, C.R.S., as may be necessary to provide services to each state agency, except the state personnel board and the public utilities commission, entitled to use administrative law judges. Administrative law judges shall be appointed in accordance with the provisions of section 13 of article XII of the state constitution and the laws and rules governing the state personnel system.

(1.5) The director of the office of administrative courts shall appoint and assign administrative law judges to hear particular cases or classes of cases that come before the office of administrative courts in a manner that, in the discretion of such director, is necessary and appropriate to provide services to each state agency.

(2) Any administrative law judge shall meet the same qualifications as a district court judge as provided in section 11 of article VI of the state constitution.

(3) (Deleted by amendment, L. 91, p. 1340, § 57, effective July 1, 1991.)

(4)(a) Administrative law judges appointed pursuant to this section shall be subject to the standards of conduct set forth in the Colorado code of judicial conduct.. The performance review plan for each administrative law judge shall include this Colorado code of judicial conduct.

(b) A complaint alleging a violation of the Colorado code of judicial conduct shall be referred to the executive director of the department of personnel who shall investigate the complaint and determine if the administrative law judge violated any canons of the code. Such administrative law judge shall be subject to the disciplinary procedures set forth in rules adopted by the state personnel board.

(c) If the decision is unsatisfactory to any party, an appeal may be made to the board of ethics for the executive branch of state government in the office of the governor.

(d) If the administrative law judge is found by the executive director or the board of ethics to have acted in violation of the canons of the Colorado code of judicial conduct, then the decision shall be made a part of the personnel file of the administrative law judge against whom the complaint was filed.

(5) In addition to the authority set forth in section 24-4-105 or as otherwise provided by law,

administrative law judges in the office of administrative courts shall have the power to:

(a) Issue subpoenas, administer oaths, and control the course of trials and other proceedings before them; and

(b) Engage in or encourage the use of alternative dispute resolution as appropriate.

CONSTITUTION OF THE STATE OF COLORADO

Article II. Bill of Rights

§ 25. Due process of law

No person shall be deprived of life, liberty or property, without due process of law.

Article III. Distribution of Powers

The powers of the government of this state are divided into three distinct departments, – the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Article VI. Judicial Department

§ 9. District courts – jurisdiction

(1) The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases, except as otherwise provided herein, and shall have such appellate jurisdiction as may be prescribed by law.

* * *

Article VI. Judicial Department

§ 20. Vacancies

(1) A vacancy in any judicial office in any court of record shall be filled by appointment of the governor, from a list of three nominees for the supreme court and any intermediate appellate court, and from a list of two or three nominees for all other courts of record, such list to be certified to him by the supreme court nominating commission for a vacancy in the supreme court or a vacancy in any intermediate appellate court, and by the judicial district nominating commission for a vacancy in any other court in that district. In case of more than one vacancy in any such court, the list shall contain not less than two more nominees than there are vacancies to be filled. The list shall be submitted by the nominating commission not later than thirty days after the death, retirement, tender of resignation, removal under section 23, failure of an incumbent to file a declaration under section 25, or certification of a negative majority vote on the question of retention in office under section 25 hereof. If the governor shall fail to make the appointment (or all of the appointments in case of multiple vacancies) from such list within fifteen days from the day it is submitted to him, the appointment (or the remaining appointments in case of multiple vacancies) shall be made by the chief justice of the supreme court from the same list within the next fifteen days. A justice or judge appointed under the provisions of this section shall hold office for a provisional term of two years and then until the second Tuesday in January

following the next general election. A nominee shall be under the age of seventy-two years at the time his name is submitted to the governor.

(2) Repealed.

(3) Other vacancies occurring in judicial offices shall be filled as now or hereafter provided by law.

(4) Vacancies occurring in the office of district attorney shall be filled by appointment of the governor. District attorneys appointed under the provisions of this section shall hold office until the next general election and until their successors elected thereat shall be duly qualified. Such successors shall be elected for the remainder of the unexpired term In which the vacancy was created.

Article VI, Judicial Department

§ 25. Election of justices and judges

A justice of the supreme court or a judge of any other court of record, who shall desire to retain his judicial office for another term after the expiration of his then term of office shall file with the secretary of state, not more than six months nor less than three months prior to the general election next prior to the expiration of his then term of office, a declaration of his intent to run for another term. Failure to file such a declaration within the time specified shall create a vacancy in that office at the end of his then term of office. Upon the filing of such a declaration, a question shall be placed on the appropriate ballot at such general election, as follows:

"Shall Justice (Judge). . . . of the Supreme (or other) Court be retained in office? YES/. . . . /NO/. . . . /." If a majority of those voting on the question vote "Yes", the justice or judge is thereupon elected to a succeeding full term. If a majority of those voting on the question vote "No", this will cause a vacancy to exist in that office at the end of his then present term of office.

In the case of a justice of the supreme court or any intermediate appellate court, the electors of the state at large; in the case of a judge of a district court, the electors of that judicial district; and in the case of a judge of the county court or other court of record, the electors of that county; shall vote on the question of retention in office of the justice or judge.

CONSTITUTION OF UNITED STATES

Current through 2010

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III. JUDICIAL DEPARTMENT

§ 1. Judicial Power, Courts, Judges

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

§ 2. Judicial Power and Jurisdiction

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SUPREME COURT OF COLORADO 2 East 14th Avenue, 4th Floor Denver, CO 80203	▲ **COURT USE ONLY** ▲
COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, 3rd Floor Denver, CO 80203 Hon. Roy, Casebolt, Connely	
Office of Administrative Courts 633 17th Street, Suite 1300 Denver, Colorado 80202 The Honorable Edwin J. Felter W.C. No. 4-685-483	
Appellant/Claimant ROSARIO AVIADO v. **Appellee/Respondent:** ENSICON CORPORATION And WAUSAU INSURANCE CORPORATION	
Attorney for Appellant: Chris Forsyth Chris Forsyth Law Office, LLC 1675 Broadway Suite 1400 Denver, Co 80202 Telephone: 303-892-3894 Facsimile: 303-892-3892 Atty. Reg.#: 22608	Case Number: Div.: Ctrm.:

MOTION FOR DISQUALIFICATION OF JUDGES PURSUANT TO C.R.C.P. RULE 97

COMES NOW the Appellant, Rosario Aviado, by and through her attorney, Chris Forsyth, Esq., and respectfully submits this Motion for Disqualification of Judges on the Basis of Impartiality, Bias and Predisposition as follows:

1. This is a workers' compensation case, It was appealed from the administrative law judge (ALJ) to the Industrial Claim Appeals Panel. The Panel ordered that the errors made by the ALJ were harmless. A Notice of Appeal was timely filed.

2. In this appeal, Aviado alleges the ALJ's error was not harmless. Furthermore, the issues endorsed for appeal include whether the jurisdiction of the Office of Administrative Courts over workers compensation cases is constitutional. It is not harmless error to let a judge, who was not selected pursuant to the selection and retention clause of the Colorado Constitution, hold an inadmissible argument and unendorsed defense against Aviado. Aviado alleges that the Colorado Constitution requires that judges who hear workers' compensation cases in the judicial branch

3. The issue of whether judges who hear workers' compensation cases should be in the judicial branch has come before the judicial

branch on previous occasions in different venues.

4. The judicial branch has stated its clear bias against having judges who hear workers' compensation cases. The judicial branch has gone to great lengths to keep judges who hear workers' compensation cases out of the judicial branch.

5. Attachments to this motion show multiple acts of the judicial branch evidencing bias and predisposition on the issue of whether workers' compensation judges should be in the judicial branch. The acts include:

   - Going on the legislative record in 1996 as opposed to the idea of workers' compensation judges being in the judicial branch,

   - Regularly opposing attempts by the legislative and executive branches to have workers' compensation judges in the judicial branch, and

   - Stacking a Court of Appeals' panel with judges to ensure the opinion is in the judicial branch's favor.

6. Canon 3 of the Code of Judicial Conduct mandates disqualification in this matter.

7. Due to the fact that the judicial branch has acted as a whole and voiced its animosity toward having workers' compensation judges in the judicial branch, the entire judicial branch is subject to disqualification.

8. According to the Clerk of the Court of Appeals, the names of the judges on the panel who will hear this case have not yet been determined. The clerk has advised that the panel will be selected after the briefs are submitted.

9. Canon 3 of the Code of Judicial Conduct contains a rule of necessity. Where disqualifications exist as to all or a majority of the members of the court, the rule of necessity requires that the matter be heard as opposed to denying the party access to courts.

10. The rule of necessity will require someone in the judicial branch to hear this case. The rule of necessity does not require, however, that any judge in the judicial branch can hear this case.

11. Although the judicial branch has acted as a whole with its desire to keep workers' compensation judges outside of the judicial branch, some judges have been more active and vocal than others.

12. The attached affidavit shows that Janice Davidson, Chief Judge of the Colorado Court of Appeals, and Mary Mullarkey, Chief Judge of the Colorado Supreme Court, have acted with particular malice toward the issue of workers' compensation judges being in the judicial branch. The rule of necessity does not necessitate their involvement in this case and they should have no involvement with this case.

13. The Court should issue an order stating that grounds for disqualification have been shown, but that the rule of necessity requires the judicial branch to hear the case.

14. In support of this motion the affidavit of undersigned counsel is attached. Also provided to the Court in the Court of Appeals' record are the legislative transcripts from HB96-1299 and the testimony of Paul Farley HB 01-1175

16. The judiciary has placed itself in a position where its partiality is clear and unequivocal. Although the rule of necessity requires a judge to hear this case, the judicial branch should do everything in its power to reduce the partiality.

WHEREFORE, Aviado requests that an order issue stating that the grounds for disqualification are clear but that the rule of necessity must be invoked.

Respectfully submitted this 28th day of May, 2008, by:

CHRIS FORSYTH LAW
OFFICE, LLC

/s/ Chris Forsyth
Chris Forsyth, #22608
1675 Broadway
Suite 1400
Denver, CO 80202

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AFFIDAVIT OF CHRIS FORSYTH

I am an attorney and I am over the age of 18 years.

One issue in the above-captioned case is whether judges who hear and decide workers' compensation cases are required by the Colorado Constitution to be in the judicial branch. Judges in the judicial branch have shown partiality on the issue of whether judges who hear and decide workers' compensation claims should be in the judicial branch. Based on the actions of the judicial branch as a whole and the actions of particular judges, the judicial branch must disqualify itself from hearing the above-captioned case.

1996 House Bill 1299: Judicial Branch states, "We don't want the work."

In 1996, a bill was introduced in the legislature that would do the same thing that appellant is asking in the above-captioned case: Place the judges who hear and decide workers' compensation claims in the judicial branch. Representative Vickie Agler introduced HB 1299 which would have placed ALJs in the judicial branch and made them accountable through the selection and retention process.

At a hearing regarding HB 1299, a representative for the judicial branch as a whole testified. A certified transcript from the hearing regarding the bill has been provided along with the Motion for Disqualification of Judges. On March 12, 1996, Kim

Morss with the Judicial Department testified. Morss testified against the bill. Specifically, Morss said of the Judicial Department, "we don't want the work." March 12, 1996, Tr. of HB96-1299, p. 41, ln. 19-20. Just before Morss testified, she states she had just spoken with the chief justice.

It must also be noted that in her testimony Morss admitted that the Judicial Department recommended the changes in the bill that eventually led to a fiscal note. Agler's original draft of the bill would have just had the judicial department essentially taking over the Division of Administrative Hearings. In other words, Agler's original bill would not have cost the state any more money than the system in place at that time. The Judicial Department, however recommended changes that created a fiscal note.

Although HB 1299 passed out of committee, the bill was killed in appropriations due to the fiscal note that was caused by changes recommended by the Judicial Branch. The judicial branch knew that if it lost in committee on the basis of the idea, it could prevail if it structured the bill so it would have a fiscal note. The judicial branch's sabotage of HB 1299 worked. The transcript from the proceedings regarding HB96-1299 show that the judicial branch is not impartial on the issue of workers' compensation judges in the judicial branch. Indeed, the transcript from HB96-1299 shows that the judicial branch will do whatever it needs to do to keep workers' compensation judges out of the judicial branch. Based on this testimony alone, it is clear that the judicial branch is not impartial on the issue of workers' compensation judges in the judicial branch.

2001: Judicial Branch Continues to Resist ALJs in the Judicial Branch.

In 2001, problems in workers' compensation proceedings and other matters were studied as part of the Governor's Task Force on Civil Justice Reform. Solutions were discussed and HB 1175 was proposed. The bill did not propose moving ALJS to the judicial branch, but did propose a different agency in the executive branch. At two committee hearings, the Director of the Division of Administrative Hearings, Paul Farley, made comments regarding why ALJs were not in the judical branch.

The certified transcripts of Farley's testimony have been provided with the Motion for Disqualification of Judges. On February 1, 2001, Farley testified that, "I know the judicial branch has been offered the administrative hearings' function a number of times over the years and they've resisted that" February 1, 2001, Tr. of HB01-1175, p. 29, ln. 15-17. Farley testified again on March 7, 2001, and it was clear from his testimony that he knew that the judicial branch did not want ALJs in its branch. See March 7, 2001, Tr. of HB01-1175, p. 11, ln. 16-19.

Once again, the knowledge of partiality of the judicial branch on the issue of workers' compensation judges in the judicial branch was placed on the record. Based on this testimony alone, it is clear that the judicial branch is not impartial on the issue of workers' compensation judges in the judicial branch.

Chief Justice Mary Mullarkey doesn't want ALJs in the judicial branch.

On January 28, 2004, undersigned counsel spoke with Representative Tambor Williams about sponsoring a bill to put ALJs in the judicial branch. Williams told Forsyth that she and the governor (undersigned counsel believed this to be Bill Owens) had previously spoken with Chief Justice Mary Mullarkey. Williams said Mullarkey was against ALJs in the judicial branch, and that Mullarkey said she couldn't make it (ALJs) work (in the judicial branch).

No bias disclosed before ruling on certiorari issue.

On March 14, 2002, the Court of Appeals issued its opinion in the case of *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002)(02SC373). On June 7, 2002, a petition for certiorari was filed in the *MGM* case.

On October 7, 2002, Supreme Court Justice Nathan B. Coats – in an official capacity – officiated at the swearing in (investiture) of an ALJ (Jamie Klein). As Chief Justice, it is highly probably that Mullarkey was responsible for the appearance. At a minimum, it appears that Mullarkey – and all judges on the Colorado Supreme Court – placed their stamp of approval on the ALJ system with Coats' appearance. The action was a blatant admission of the judicial branch's bias on the ALJ issue – while a case challenging the ALJ system was pending certiorari with the Court.

On January 27, 2003, Colorado Supreme Court Justice Mary Mullarkey, along with the rest of the supreme court, denied certiorari in the *MGM* case. Neither Mullarkey nor any other judge ever revealed the judicial branch's ongoing bias and political activism against ALJs in the judicial branch. Undersigned counsel was not aware of the facts in this affidavit until he looked further into the issue at a later point in time.

Court of Appeals Panel is stacked.

The case of *Dee Enterprises v. Indus. Claim Appeals Office,* 89 P.3d 430 (Colo. App. 2003) was determined by the Court of Appeals. Constitutional and jurisdictional arguments were listed in the issues for appeal. The opening brief was filed on February 10, 2003. A panel of judges was assigned to the case. Judge Taubman was one of the judges on the panel.

Before oral argument in the *Dee Enterprises* case, however, the panel of judges changed. Judges Hume, Sternberg and Davidson were assigned to the case. Davidson was the chief judge of the Court of Appeals at the time. Sternberg and Hume were retired at the time, and pursuant to statute they could only be assigned by Supreme Court Chief Justice Mary Mullarkey. Colo. Rev. Stat, § 13-4-104.5.

Not only were Sternberg and Hume retired, they were both former chief judges of the Court of Appeals. In other words, the case was taken from the hands of the original panel and placed in the hands of the panel constructed by Supreme Court Chief Justice Mary Mullarkey. The new panel consisted of two former chief judges and the current chief judge of the Court of Appeals. This is important because the chief judge of the Court of Appeals is an administrative aide for the chief justice of the Supreme Court. Colo. Rev. Stat. § 13-4-105 reads as follows:

> The chief justice of the supreme court shall appoint a judge of the court of appeals to serve as chief judge at the pleasure of the chief justice. The chief judge shall exercise such administrative powers as may be delegated to him by the chief justice.

In other words, the *Dee Enterprises* panel was stacked with judges who worked closely with the chief justice and were familiar with the chief justice's desires. This was not an independent panel by any stretch of the imagination. What did the chief justice tell her current chief judge? Did Mullarkey tell Davidson that if it was found that workers' compensation cases must be heard in the judicial branch that Davidson would have to administrate the court? Were Sternberg and Hume along for the ride to fulfill the wishes of their former boss who they worked closely with for years?

On July 31, 2004, the Court of Appeals issued a written opinion in the *Dee Enterprises* case. It must be noted that the rationale for the opinion was not argued by the opposing side in the case. The rationale was based on issues raised by the court. Once enunciated, the court never allowed a meaningful opportunity for the rationale to be challenged. Furthermore, at this point the judicial branch had still not revealed its disdain for having workers' compensation judges in the judicial branch. Indeed, the judicial branch once again did everything it could to avoid having workers' compensation judges a part of the judicial branch.

Former supreme court justice admits bias of the judicial branch.

The claimant in the *Dee Enterprises* case sued the insurance company for bad faith based on the arguments in the appeal, Former supreme court justice Jean E. Dubofsky was hired as plaintiff's expert in the case. In her report, Dubofsky glossed over the merits of the case and got to the heart of the matter. "To rule that all hearings on benefits under workers' compensation would have to be in courts would increase the workload of the courts, something that an appellate court is not going to do, I believe that Mid-Century's constitutional challenges to the workers' compensation structure had less than a one percent chance of success."

In other words, the former supreme court justice admitted that the Court of Appeals would rule against the argument that workers' compensation judges should be in the judicial branch – not based on the merit of the argument, but because the judicial branch didn't want the work. The Dubofsky report is an admission of bias from a former supreme court justice.

And it may be interesting to note that the people mentioned in this affidavit – Farley, Dubofsky and Williams – are currently members of the state Judicial Performance Commission.

Judicial complaint is swept under the rug.

Based on the above, undersigned counsel filed a complaint with the Judicial Discipline Commission on May 7, 2004. Pursuant to law, undersigned counsel cannot disclose the documents from the complaint. But suffice it to say that the complaint was not even investigated, despite the fact that many judicial canons were violated. See Judicial Canons 7, 4, 3, 2, 1 and Rule 5(a)(1) of the Colorado rules of Judicial Discipline.

The judicial discipline commission essentially works for the Supreme Court. *See* Rule 3 of the Colorado Rules of Judicial Discipline. Although the committee does not perform any judicial function, the committee answers to the Supreme Court. One doesn't have to be that bright to see the conflict that arises when a complaint is filed regarding the judges who oversee the commission. The Supreme Court is policing itself. Undersigned counsel was contacted by the Judicial Discipline Commission and told that the complaint would not be investigated. Although it supposedly was not investigated, the attorney for the commission told undersigned counsel that he had spoken with the chief justice and that the "we don't want the work" comment was made when another judge was chief justice. The attorney for the commission stated that the rule of necessity required the judges to rule. But this is incorrect because at least Mullarkey and Coates could have recused themselves based on their actions. Furthermore, they should have revealed the bias beforehand. The complaint regarding the judges should have been referred to independent counsel. It was not. The chief justice ensured the complaint would not be investigated. And pursuant to Rule 9 of the Colorado Rules of Judicial Discipline the Supreme Court Chief Justice should have recused herself. By admitting he talked with Mullarkey, the attorney for the commission brought into great question the validity of its finding and the integrity of the judiciary.

The rule of necessity does not allow just any judge to hear this case.

The partiality of the judicial branch on the issue of workers' compensation judges in the judicial branch is clear and unequivocal. The judicial branch does not want to have judges who hear and decide workers' compensation cases included within the branch. Aviado is arguing in this case that the Colorado Constitution requires that judges who hear and decide workers' compensation cases be a part of the judicial branch, subject to selection and retention. Therefore, there is a clear partiality against the argument Aviado is making. And that partiality is not based on any law or case; The partiality is based on the judicial branch's desire. The judicial branch doesn't "want the work."

The rule of necessity is contained in Canon 3 of the Code of Judicial Conduct. Aviado must have access to the court. The judicial branch spoke as a whole when it said "we don't want the work." Pursuant to the judicial canons, undersigned counsel does not believe such statement was appropriate by the judicial branch, but nevertheless the statement was made. And the utterance of the statement showed the partiality of the entire judicial branch.

There are many judges at the Court of Appeals, however, who would be better to hear this case than others. Obviously Chief Judge Janice Davidson should not be on the panel. Also obvious is that Supreme Court Chief Justice Mary Mullarkey should have nothing to do with the selection of a panel. Any of the judges who were involved with the prior opinions are suspect. In other words, the Court of Appeals has the power to at least attempt to reduce the partiality of a panel hearing the case, It is important to note, however, that the partiality of the judiciary on this issue cannot be erased. Aviado requests that a panel be selected pursuant to the rule of necessity and the parties informed of the names on the panel as soon as it is selected.

Conclusion

The fact that I have to submit the Motion for Disqualification of Judges in this matter is disturbing. I should not have to make such motion. The judges should not have done what they did. My client summed it up best when she reacted to the facts of this matter. Without waiving any attorney-client privilege, my client told me, "I didn't think they did those things in America. I thought they only did things like that back home." She's originally from the Philippines.

Furthermore, the irony of this whole issue is not lost on me. After all, one has to question why someone would want a judge in the judicial branch when the judges in the judicial branch proceed with such clear partiality. We're having to ask judges in the judicial branch to recuse while we're making the substantive argument that workers' compensation hearings must be heard by judicial branch judges. Maybe the executive branch does have better judges than the judicial branch. But by placing the judges in the executive branch, the selection and retention provisions of the Colorado Constitution are lost. The selection and retention provisions are to ensure the quality of the judiciary. The judges go through a selection process with the hope that the process will ensure a judge has sufficient qualities to be a good judge. Once a judge is appointed, if he or she is doing a bad job, the people can vote him or her off of the bench. No such rights apply to executive branch judges.

Aviado's workers' compensation claim is for a lifetime of benefits which equals hundreds of thousands of dollars. It is most likely the most important case of her life. She has constitutional rights. As an attorney, I am sworn to uphold the Colorado Constitution. I am sworn to seek the improvement of justice, and I am to be an advocate for my client. All of these things require me to file the Motion for Disqualification of Judges and this affidavit with the motion. The judicial branch is clearly partial on the issues to be litigated in this appeal.

Based on the actions of the judiciary, an impartial panel cannot be found to determine the issues in this appeal. It is my opinion, based on the facts set forth above, that a fair and impartial hearing cannot be had in the judicial branch on the issue of whether workers' compensation judges should be in the judicial branch. It is my opinion that the judicial branch has shown clear bias that is based on its pure desire as opposed to any legal argument. Any opinion that keeps workers' compensation judges out of the judicial branch will be suspect. Nevertheless, Aviado must have access to the courts. It is respectfully requested that the Court of Appeals acknowledge that grounds for disqualification exist and that the rule of necessity must be invoked in this matter. It is respectfully requested that the Court of Appeals do whatever it can to decrease the partiality of any panel selected in this matter.

Dated this 28th day May, 2009, by:

/s/ Chris Forsyth
Chris Forsyth, Reg. No. 22608

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

Subscribed and sworn to before me this 28th day of May, 2009, by Chris Forsyth.

My commission expires:
4/11/2010

/s/ Mary E. Livesay
[SEAL] Notary public Address: